
IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

THE R. R. THOMPSON ESTATE COMPANY,
a Corporation,

Plaintiff in Error,

vs.

LOUISE WEINHARD and ANNA WESSINGER,
PAUL WESSINGER and HENRY
WAGNER, Executrices and Executors, respectively,
of the Last Will and Testament of Henry
Weinhard, Deceased,

Defendants in Error.

In Error to the District Court of the United States for
the District of Oregon.

TRANSCRIPT OF RECORD

Filed

AUG 27 1917

F. D. Monckton,

Clerk.

No.

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Weinhard, Deceased,

Defendants in Error.

Names and Addresses of Attorneys upon this Writ of
Error.

For Plaintiff in Error:

BAUER & GREENE and A. H. McCURTAIN,
Henry Building, Portland, Oregon.

For Defendants in Error

SIDNEY TEISER,
Morgan Building, Portland, Oregon
JULIUS SILVERSTONE,
Lumbermans' Building, Portland, Oregon.

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BE IT REMEMBERED, that on the 2nd day of October, 1916, there was duly filed in the District Court of the United States for the District of Oregon, a Bill of Complaint in words and figures as follows, to-wit:

BILL OF COMPLAINT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

LOUISE WEINHARD and ANNA WESSINGER, PAUL WESSINGER and HENRY WAGNER, Executrices and Executors, respectively, of the Last Will and Testament of Henry Weinhard, Deceased,

Plaintiffs,

vs.

THE R. R. THOMPSON ESTATE COMPANY, a Corporation,

Defendant.

COMPLAINT.

Comes now Louise Weinhard, Anna Wessinger, Paul Wessinger and Henry Wagner, executrices and executors, respectively, of the last will and testament of the estate of Henry Weinhard, deceased, plaintiffs, and for a first cause of action complain of The R. R.

Thompson Estate Company, a corporation, defendant, as follows, to-wit:

I.

That Louise Weinhard and Anna Wessinger, Paul Wessinger and Henry Wagner at all the times hereinafter mentioned were, and ever since have been, and now are, the executrics and executors, respectively, of the last will and testament of Henry Weinhard, deceased, duly appointed and qualified by the County Court of the State of Oregon for the County of Multnomah, in which said Court the estate of said Henry Weinhard, deceased, is in the course of probate and administration, and duly empowered to bring this action, and that all of them are citizens of the State of Oregon.

II.

That at all the times hereinafter mentioned The R. R. Thompson Estate Company was, ever since has been and now is a corporation, duly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business therein, and that said corporation is a citizen of the State of California; that said corporation is carrying on business in the State of Oregon by an agent, and that said corporation, pursuant to the laws of the State of Oregon, has duly executed, acknowledged and filed a power of attorney in the office of the Secretary of State appointing a resident of the State of Oregon as its attorney in fact, authorized to accept service of all writs, processes and summons, and that the acting attorney in fact so ap-

pointed for said corporation is Henry W. Fries, a resident of Portland, Oregon.

III.

That on the 6th day of March, 1912, at Portland, Oregon, for value received, Multnomah Hotel Company, a corporation, Philip Gevurtz and I. Gevurtz & Sons, a corporation, the latter two being accommodation makers, made and delivered to the plaintiffs herein their promissory negotiable note, of which the following is a copy, to-wit:

\$4,500.00.

Portland, Ore., March 6, 1912.

On demand after date, without grace, we or either of us, promise to pay to the order of Louise Weinhard, Anna Wessinger, Paul Wessinger and Henry Wagner, Executrices and Executors respectively of the Last Will and Testament of Henry Weinhard, Deceased, at Portland, Oregon, Forty-five Hundred and no/100 Dollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin at the rate of six per cent per annum from date until paid, for value received. Interest to be paid quarterly, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we or either of us promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum, in like Gold

Coin, as the Court may adjudge reasonable, for attorney's fees to be allowed in said suit or action.

MULTNOMAH HOTEL CO.,

Philip Gevurtz, Pres.

PHILIP GEVURTZ.

I. GEVURTZ & SONS,

P. Gevurtz, Pres.

IV.

That demand has been made upon said Multnomah Hotel Company for the payment of said note on the 1st day of February, 1916, and at numerous times previous thereto, and that no part of said note has been paid except the sum of One Thousand Dollars (\$1,000.00), Five Hundred Dollars (\$500.00) of which was paid on the 4th day of May, 1914, and Five Hundred Dollars (\$500.00) of which was paid on the 6th day of October, 1914, and that there is now due and unpaid upon said note the principal sum of Thirty-five Hundred Dollars (\$3,500.00) with interest on Forty-five Hundred Dollars (\$4,500.00) thereof at the rate of six per cent (6%) per annum from the 6th day of March, 1912, to the 4th day of May, 1914; with interest on Four Thousand Dollars (\$4,000.00) thereof at the rate of six per cent (6%) per annum from the 4th day of May, 1914, until the 6th day of October, 1914, and with interest on Thirty-five Hundred Dollars thereof at the rate of six per cent (6%) per annum from the 6th day of October, 1914, until paid.

V.

That a reasonable attorney's fee for the preparation and prosecution of this action is Five Hundred Dollars (\$500.00).

VI.

That the Multnomah Hotel Company, one of the makers of said note, and who received the consideration for which the said note was given, was, at the making of said note and for a considerable time thereafter, the lessee and operator of the Hotel known as the Multnomah Hotel in the City of Portland, Oregon; that I. Gevurtz & Sons, a corporation, was, at the time of signing said note, the owner of a large majority, if not all, of the capital stock of said Multnomah Hotel Company; that Philip Gevurtz was, at the time of making said note, the president and one of the directors of the Multnomah Hotel Company, and an officer and director of said I. Gevurtz & Sons, Company, a corporation; and that The R. R. Thompson Estate Company, a corporation, defendant herein, was, at the time of making said note and for a considerable period thereafter, the owner and lessor of the property occupied by said Multnomah Hotel Company, a corporation, as a hotel, namely, the Multnomah Hotel.

VII.

That on or about the 1st day of January, 1913, and for a period of time anterior thereto, said I. Gevurtz & Sons, the holder of practically all of the capital stock of the Multnomah Hotel Company, was financially involved, and that likewise said Multnomah Hotel Com-

pany was heavily financially involved and owing large sums of money; and that at said time the said defendant, The R. R. Thompson Estate Company, owner and lessor of said Multnomah Hotel, in order to protect its property and for other reasons, offered to purchase, and did purchase, from said I. Gevurtz & Sons all of the capital stock of said Multnomah Hotel Company and agreed to pay therefor the sum of One Hundred Seventy-five Thousand Dollars (\$175,000.00). That said sum of \$175,000 was agreed to be held by the said The R. R. Thompson Estate Company and paid out by it to creditors of the said Multnomah Hotel Company, and the said The R. R. Thompson Estate Company agreed to assume the said debts of said corporation existing at the time of said purchase of said capital stock to the extent of \$175,000; and further agreed with the said I. Gevurtz & Sons that should said debts of said corporation exceed the sum of \$175,000 that said I. Gevurtz & Sons should discharge the same, or upon its immediate inability to do so that said The R. R. Thompson Estate Company, at its option, might advance the sum of Thirty-five Thousand Dollars (\$35,000.00) for the purpose of paying all the said debts of said Multnomah Hotel Company in excess of \$175,000, distributing said money on behalf of said Multnomah Hotel Company; and, further, should said debts exceed the said sum of \$175,000, and the sum of \$35,000 in addition, namely, the sum of \$210,000, then the said The R. R. Thompson Estate Company might assume, at its option, to pay debts of the Multnomah Hotel Company in excess of said \$210,000; and that upon the said The R. R. Thomp-

son Estate Company advancing said sums of money for the payment of said debts, or the assumption of said debts by said The R. R. Thompson Estate Company, the said I. Gevurtz & Sons should execute in favor of said The R. R. Thompson Estate Company a note in the amount of Thirty-five Thousand Dollars (\$35,000.00), and should also indemnify and hold harmless and reimburse the said The R. R. Thompson Estate Company for any and all sums of money paid and liabilities incurred for the debts paid or assumed of said Multnomah Hotel Company in excess of Two Hundred and Ten Thousand Dollars (\$210,000.00).

VIII.

That The R. R. Thompson Estate Company exercised its option to assume, and agreed to pay and assume all the debts of the Multnomah Hotel Company owing at the time of the said purchase of said capital stock in excess of \$175,000, and took from said I. Gevurtz & Sons said note and indemnity, heretofore mentioned in paragraph VII, and that said The R. R. Thompson Estate Company assumed the debts of said Multnomah Hotel Company owing the plaintiffs herein, which said debt was owing at the time of the purchase of said stock by said The R. R. Thompson Estate Company.

IX.

That on or about the 9th day of May, 1913, said I. Gevurtz & Sons were adjudged, by the District Court of the United States for the District of Oregon, bank-

rupt, and that said The R. R. Thompson Estate Company, defendant herein, in said proceedings in bankruptcy admitted its assumption of all of the debts of the said Multnomah Hotel Company owing by said company at the time of said purchase of the capital stock and its liability to pay the same, including that of the plaintiffs herein, and in said proceedings, on or about the 29th day of May, 1913, filed its claim against said I. Gevurtz & Sons, bankrupt, for the amount of debts of said Multnomah Hotel Company assumed or paid by it in excess of \$175,000.00, to-wit: in the amount of said note of \$35,000.00, and in the sum of \$24,439.42 in addition thereto; that the latter amount was claimed by reason of the agreement by I. Gevurtz & Sons to indemnify The R. R. Thompson Estate Company upon its payment or assumption of the alleged debts of the Multnomah Hotel Company in excess of \$210,000.00; and that the consideration for said note and for said agreement to indemnify, as set forth in said bankruptcy proceedings, was the payment or assumption of the said alleged indebtedness of said Multnomah Hotel Company in excess of \$175,000.00, which it, the defendant The R. R. Thompson Estate Company, had paid, or assumed, and among said indebtedness assumed was that of said plaintiffs as hereinbefore set forth.

X.

That in said bankruptcy proceedings of I. Gevurtz & Sons the said claim of The R. R. Thompson Estate Company was allowed as claimed, with the exception of \$2,933.38, and that said deduction of \$2,933.38 was

made by a stipulation of the said The R. R. Thompson Estate Company and the trustees of said bankrupt because of several disputed items, not involving the debt due said plaintiffs; and that said The R. R. Thompson Estate Company has received dividends in said bankruptcy proceedings upon its said claim as allowed.

XI.

That by reason of the premises aforesaid the said The R. R. Thompson Estate Company became and is indebted to the said plaintiffs herein in the sum of Thirty-five Hundred Dollars (\$3,500.00), with interest on Forty-five Hundred Dollars (\$4,500.00) at the rate of six per cent per annum from March 6, 1912, to the 4th day of May, 1914, and with interest upon Four Thousand Dollars (\$4,000.00) at the rate of six per cent per annum from the 4th day of May, 1914, to the 6th day of October, 1914, and with interest on Thirty-five Hundred Dollars (\$3,500.00) from the 6th day of October, 1914, until paid; and that demand has been made of said The R. R. Thompson Estate Company on or about the 15th day of April, 1916, for the payment of said debt, but that notwithstanding said demand payment thereof has not been made.

And for a second and further cause of action plaintiffs complain and allege as follows, to-wit:

I.

That Louise Weinhard and Anna Wessinger, Paul Wessinger and Henry Wagner at all times hereinafter

mentioned were, and ever since have been, and now are, the Executrices and Executors, respectively, of the Last Will and Testament of Henry Weinhard, deceased, duly appointed and qualified by the County Court of the State of Oregon for the County of Multnomah, in which said Court the estate of said Henry Weinhard, deceased, is in the course of probate and administration, and duly empowered to bring this action, and that all of them are citizens of the State of Oregon.

II.

That at all the times hereinafter mentioned The R. R. Thompson Estate Company was, ever since has been and now is a corporation, duly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business therein, and that said corporation is carrying on business in the State of Oregon by an agent, and that said corporation, pursuant to the laws of the State of Oregon, has duly executed, acknowledged and filed a Power of Attorney in the office of the Secretary of State appointing a resident of the State of Oregon as its Attorney in Fact, authorized to accept service of all writs, proecesses and summonses, and that the acting Attorney in Fact so appointed for said corporation is Henry W. Fries, a resident of Portland, Oregon.

III.

That on the 6th day of March, 1912, at Portland, Oregon, for value received, Multnomah Hotel Com-

pany, a corporation, Philip Gevurtz & I. Gevurtz & Sons, a corporation, the latter two being accommodation makers, made and delivered to the plaintiffs herein their promissory negotiable note, of which the following is a copy, to-wit:

\$4,500.00.

Portland, Ore., March 6, 1912.

On demand after date, without grace, we or either of us, promise to pay to the order of Louise Weinhard, Anna Wessinger, Paul Wessinger and Henry Wagner, Executrices and Executors respectively of the Last Will and Testament of Henry Weinhard, Deceased, at Portland, Oregon, Forty-five Hundred and no/100 Dollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin at the rate of six per cent per annum from date until paid, for value received. Interest to be paid quarterly, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we or either of us promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum in like Gold Coin as the court may adjudge reasonable, for attorney's fees to be allowed in said suit or action.

MULTNOMAH HOTEL CO.,

Philip Gevurtz, Pres.

PHILIP GEVURTZ,

I. GEVURTZ & SONS,

P. Gevurtz, Pres.

IV.

That demand had been made upon said Multnomah Hotel Company for the payment of said note on the 1st day of February, 1916, and at numerous times previous thereto, and that no part of said note has been paid except the sum of One Thousand Dollars (\$1000.00) Five Hundred Dollars (\$500.00) of which was paid on the 4th day of May, 1914, and Five Hundred Dollars (\$500.00) of which was paid on the 6th day of October, 1914, and that there is now due and unpaid upon said note the principal sum of Thirty-five Hundred Dollars (\$3,500.00) with interest on Forty-five Hundred Dollars (\$4,500.00) thereof at the rate of Six per cent (6%) per annum from the 6th day of March, 1912, to the 4th day of May, 1914, with interest on Four Thousand Dollars (\$4,000.00) thereof at the rate of Six per cent (6%) per annum from the 4th day of May, 1914, until the 6th day of October, 1914, and with interest on Thirty-five Hundred Dollars thereof at the rate of Six per cent (6%) per annum from the 6th day of October, 1914, until paid.

V.

That a reasonable attorneys' fee for the preparation and prosecution of this action is Five Hundred Dollars (\$500.00).

VI.

That the Multnomah Hotel Company, one of the makers of said note, and who received the consideration for which the said note was given, was, at the making of

said note and for a considerable time thereafter, the lessee and operator of the hotel known as the Multnomah Hotel in the City of Portland, Oregon; that I. Gevurtz & Sons, a corporation, was, at the time of signing said note, the owner of a large majority, if not all, of the capital stock of said Multnomah Hotel Company; that Philip Gevurtz was, at the time of making said note, the President and one of the Directors of the Multnomah Hotel Company, and an officer and Director of said I. Gevurtz & Sons Company, a corporation; and that The R. R. Thompson Estate Company, a corporation, defendant herein, was, at the time of making said note and for a considerable period thereafter the owner and lessor of the property occupied by said Multnomah Hotel Company, a corporation, as a hotel, namely, the Multnomah Hotel.

VII.

That on or about the 1st day of January, 1913, and for a period of time anterior thereto, said I. Gevurtz & Sons, the holder of practically all of the capital stock of the Multnomah Hotel Company, was financially involved, and that likewise said Multnomah Hotel Company was heavily financially involved and owing large sums of money; and that at said time, the said defendant, The R. R. Thompson Estate Company, owner and lessor of said Multnomah Hotel, in order to protect its property and for other reasons, offered to purchase, and did purchase and receive from said I. Gevurtz & Sons all of the capital stock of said Multnomah Hotel Company and agreed to pay therefor the sum of One Hundred Seventy-five Thousand Dollars (\$175,000.00).

That said sum of \$175,000.00 was agreed to be held by the said The R. R. Thompson Estate Company and paid out by it to the existing creditors of the said Multnomah Hotel Company, and the said The R. R. Thompson Estate Company thereupon and then agreed to assume the said debts of said corporation then existant to the extent of \$175,000.00, and that the said Multnomah Hotel Company then owed to said plaintiffs the debt which is the subject of this action.

VIII.

That the debts for which the Multnomah Hotel Company was liable at said time, including that of plaintiffs herein, did not amount to the sum of \$175,000.00.

IX.

That by reason of the premises aforesaid the said The R. R. Thompson Estate Company became, was and is indebted to the said plaintiffs herein in the principal sum of \$3,500.00, with interest on \$4,500.00 at the rate of six per cent per annum from the 6th day of March, 1912, to the 4th day of May, 1914; with interest on \$4,000.00 at the rate of six per cent per annum from the 4th day of May, 1914, until the 6th day of October, 1914, and with interest on \$3,500.00 at the rate of six per cent per annum from the 6th day of October, 1914, until paid, and that on or about the 15th day of April, 1916, demand was made upon The R. R. Thompson Estate Company for the payment of said debt, but that notwithstanding said demand payment thereof has not been made.

WHEREFORE, Plaintiffs pray that they may be awarded judgment against said defendant in the amount of \$3,500.00, with interest on \$4,500.00 at the rate of six per cent per annum from the 6th day of March, 1912, to the 4th day of May, 1914; with interest on \$4,000.00 at the rate of six per cent per annum from the 4th day of May, 1914, until the 6th day of October, 1914, and with interest on \$3,500.00 at the rate of six per cent per annum from the 6th day of October, 1914, until paid; together with the sum of \$500.00, reasonable attorneys' fee herein; and the costs and disbursements in this action.

JULIUS SILVESTONE,

SIDNEY TEISER,

Attorneys for Plaintiffs.

UNITED STATES OF AMERICA,

Dist. and State of Oregon,

County of Multnomah,—ss.

Comes now, Henry Wagner, one of the executors of the last Will and Testament of Henry Weinhard, deceased, one of plaintiffs herein, who upon being duly sworn deposes and says, that I have read the foregoing complaint, that the facts set forth therein are true to the best of my information and belief.

HENRY WAGNER.

Subscribed and sworn to before me this 2nd day of October, 1916.

L. H. HAMIG,

Notary Public for Oregon.

My commission expires September 21, 1920.

(Notarial Seal)

(Endorsed) Filed Oct. 2, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 14th day of December, 1916, there was duly filed in said court and cause an Amended Answer (omitting title and formal parts) in words and figures as follows, to-wit:

AMENDED ANSWER

Now comes the defendant, and for answer to plaintiff's complaint admits, denies and alleges as follows:

I.

Admits paragraphs I and II of said complaint.

II.

Denies that it has any knowledge or information sufficient to form a belief as to any of the matters and things alleged in paragraph III of said complaint, and therefore denies the same.

III.

Denies paragraphs IV and V of said complaint.

IV.

Admits that the Multnomah Hotel Company was the lessee and operator of the hotel known as the Multnomah Hotel in the City of Portland, Oregon; that I.

Gevurtz & Sons, a corporation, was the owner of a large majority, if not all, of the capital stock of said company; that Philip Gevurtz was at the time of making said alleged note, the president and one of the directors of said Multnomah Hotel Company, and an officer and director of said I. Gevurtz & Sons, a corporation; that defendant was then and for a considerable period thereafter, the owner and lessor of the property occupied by said Multnomah Hotel Company. Denies all allegations of paragraph VI of said complaint not herein expressly admitted.

V.

Admits that on or about the 1st day of January, 1913, and for some time prior thereto, I. Gevurtz & Sons, a corporation, was the holder of practically all of the capital stock of the Multnomah Hotel Company. Denies all allegations of paragraph VII of said complaint not herein expressly admitted.

VI.

Denies paragraph VIII of said complaint.

VII.

Admits that on or about the 9th day of May, 1913, I. Gevurtz & Sons was adjudged a bankrupt by the United States District Court for the District of Oregon, but denies all other allegations contained in paragraph IX of said complaint.

VIII.

Denies paragraphs X and XI of said complaint.

And for answer to plaintiff's second and further cause of action defendant admits, denies and alleges as follows:

I.

Admits paragraphs I and II thereof.

II.

Denies that it has any knowledge or information sufficient to form a belief as to any of the matters and things alleged in paragraph III of said complaint, and therefore denies the same.

III.

Denies paragraphs IV and V of said complaint.

IV.

Admits that the Multnomah Hotel Company at the time of the making of said alleged note, and for a considerable time thereafter was the lessee and operator of the hotel known as the Multnomah Hotel in the City of Portland, Oregon; that I. Gevurtz & Sons, a corporation, was at said time the owner of a large majority, if not all, of the capital stock of said Multnomah Hotel Company; that Philip Gevurtz was at said time the president and one of the directors of the Multnomah Hotel Company, and an officer and director

of said I. Gevurtz & Sons; that defendant for a considerable time thereafter was the owner and lessor of the property occupied by said Multnomah Hotel. Denies all allegations contained in paragraph VI of said further and separate cause of action not herein expressly admitted.

V.

Admits that on or about the 1st day of January, 1913, and for a period of time prior thereto, said I. Gevurtz & Sons was the owner of practically all of the capital stock of the Multnomah Hotel Company; that at said time defendant was the owner and lessor of said Multnomah Hotel. Denies all other allegations contained in paragraph VII of said further and separate cause of action.

VI.

Denies paragraph VIII of said further and separate cause of action, and alleges that at said time the debts of said Multnomah Hotel Company, including the alleged debt of plaintiff herein, amounted to more than \$210,000.00.

VII.

Denies paragraph IX of said further and separate cause of action.

And for a further and separate defense to plaintiff's first cause of action defendant alleges:

I.

That the Multnomah Hotel Company was and is a corporation duly organized and existing under and

by virtue of the laws of the State of Oregon, with its principal office and place of business in Portland, Oregon; that as such corporation it duly adopted certain by-laws at the time of its organization, which have ever since been and still are in full force and effect; that in and by said by-laws it was and is provided that all the promissory notes and obligations of said corporation should be signed jointly by its president and treasurer; that Philip Gevurtz, the president of said Multnomah Hotel Company had no authority to make, execute or deliver the promissory note set out in the first cause of action stated in plaintiff's complaint, or any note of said corporation, without the joint signature of its treasurer.

For answer to the second cause of action set out in plaintiff's complaint, defendant alleges:

I.

That the Multnomah Hotel Company was and is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business in Portland, Oregon; that as such corporation it duly adopted certain by-laws at the time of its organization, which have ever since been and now are in full force and effect; that in and by said by-laws it was and is provided that all the promissory notes and obligations of said corporation should be signed jointly by its president and treasurer; that Philip Gevurtz, the president of said Multnomah Hotel Company, had no authority to make, execute or deliver the note set out in plaintiff's second

cause of action, or any note of said corporation, without the joint signature of its treasurer.

WHEREFORE, Defendant prays for judgment against the plaintiffs for its costs and disbursements herein.

BAUER & GREENE and
A. H. McCURTAIN,

Attorneys for Defendant.

(Endorsed) Filed Dec. 14, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 20th day of December, 1916, there was duly filed in said court and cause a Reply (omitting title and formal parts) in words and figures as follows, to-wit:

REPLY

Come now plaintiffs above named, and for reply to defendant's further and separate defense to plaintiffs' first cause of action, contained in the amended answer filed by said defendant, reply and say:

I.

That they have not sufficient information on which to form a belief as to the correctness of the allegations contained in paragraph I of said further and separate defense to the effect that the Multnomah Hotel Company, a corporation, duly adopted certain by-laws at the time of its organization, which have ever since been and still are in full force and effect, and that in and by

said by-laws it was and is provided that all of the promissory notes and obligations of said corporation should be signed jointly by its President and Treasurer, and therefore deny said allegations; and further deny that Philip Gevurtz, the President of the said Multnomah Hotel Company had no authority to make, execute or deliver the promissory note set out in the first cause of action stated in plaintiffs' complaint, or any note of said corporation without the joint signature of its treasurer.

And as a further reply to defendant's further and separate defense to plaintiffs' first cause of action, plaintiffs allege and reply as follows:

I.

That at the time of the making, executing and delivering of said promissory note, set out in plaintiffs' complaint, by Philip Gevurtz, President of said Multnomah Hotel Company, on behalf of said Multnomah Hotel Company, a corporation, the said Multnomah Hotel Company received the consideration for said note, to-wit: Forty-five Hundred (\$4500) Dollars in cash; that it accepted said consideration and thereafter used said money for its own purposes, and received the benefits thereof; and was estopped from setting up the alleged absence of authority of the officer making, executing and delivering said note, and that said alleged defense, not being available to it, is not available to said defendant.

And as a second and further reply to defendant's

further and separate answer and defense to plaintiffs' first cause of action, plaintiffs reply and say:

I.

That subsequent to the making, executing and delivering of said note and of receiving the consideration therefor, said Multnomah Hotel Company, a corporation, ratified the action of said Philip Gevurtz, President, in making, executing and delivering said note.

And as a third and further reply to defendant's further and separate answer and defense to plaintiffs' first cause of action, plaintiffs reply and allege as follows:

I.

That in the bankruptcy proceedings of I. Gevurtz & Sons, instituted in the District Court of the United States for the District of Oregon, the defendant filed, on or about the 29th day of May, 1913, a proof of claim, wherein it alleged that it had assumed to pay, amongst other debts, the said note set forth in plaintiffs' complaint; that based on said allegation in said proof of claim, the said claim was allowed by the referee in bankruptcy in said proceedings, and that the said defendant received and accepted, and retained the benefits of, dividends in said proceedings, and that thereby it is estopped from setting up the alleged invalidity of said note.

And for a fourth and further reply to defendant's further and separate answer and defense to plaintiffs'

first cause of action, plaintiffs reply and allege as follows:

I.

That in the bankruptcy proceedings of J. Gevurtz & Sons, instituted in the District Court of the United States for the District of Oregon, the said defendant, on or about the 29th day of May, 1913, filed a proof of claim in said proceedings wherein it alleged its liability for the payment of the note set forth in plaintiffs' complaint, and upon its representation in that regard made, its claim, based on said liability, was allowed; and that the said defendant thereafter received and retained dividends upon said claim so claimed and allowed as aforesaid, and that thereby the said defendant is estopped of record from setting up the alleged want of authority of the President of said Multnomah Hotel Company, a corporation, to execute the said note on behalf of the said corporation, or to otherwise attack the validity of said note.

And as a reply to defendant's further and separate defense to plaintiffs' second cause of action, plaintiffs reply and say:

I.

That they have not sufficient information on which to form a belief as to the correctness of the allegations contained in paragraph I of said further and separate defense to the effect that the Multnomah Hotel Company, a corporation, duly adopted certain by-laws at the time of its organization which have ever since been

and still are in full force and effect, and that in and by said by-laws it was and is provided that all of the promissory notes and obligations of said corporation should be signed jointly by its President and Treasurer, and therefore deny said allegations, and further deny that Philip Gevurtz, the President of the said Multnomah Hotel Company had no authority to make, execute or deliver the promissory note set out in the first cause of action stated in plaintiffs' complaint, or any note of said corporation without the joint signature of its treasurer.

And as a further reply to defendant's further and separate defense to plaintiffs' second cause of action, plaintiffs allege and reply as follows:

I.

That at the time of the making, executing and delivering of said promissory note, set out in plaintiffs' complaint, by Philip Gevurtz, President of said Multnomah Hotel Company, on behalf of said Multnomah Hotel Company, a corporation, the said Multnomah Hotel Company received the consideration for said note, to-wit: Forty-five Hundred (\$4500) Dollars in cash; that it accepted said consideration and thereafter used said money for its own purposes and received the benefits thereof, and was estopped from setting up the alleged absence of authority of the officer making, executing and delivering said note, and that said alleged defense, not being available to it, is not available to said defendant.

And as a second and further reply to defendant's further and separate answer and defense to plaintiffs' second cause of action, plaintiffs reply and say:

I.

That subsequent to the making, executing and delivering of said note and of receiving the consideration therefor, said Multnomah Hotel Company, a corporation, ratified the action of said Philip Gevurtz, President, in making, executing and delivering said note.

And as a third and further reply to defendant's further and separate answer and defense to plaintiffs' second cause of action, plaintiffs reply and allege as follows:

I.

That in the bankruptcy proceedings of I. Gevurtz & Sons, instituted in the District Court of the United States for the District of Oregon, the defendant filed, on or about the 29th day of May, 1913, a proof of claim, wherein it alleged that it had assumed to pay, amongst other debts, the said note set forth in plaintiffs' complaint; that based on said allegations in said proof of claim, the said claim was allowed by the referee in bankruptcy in said proceedings, and that the said defendant received and accepted, and retained the benefits of, dividends in said proceedings, and that thereby it is estopped from setting up the alleged invalidity of said note.

And for a fourth and further reply to defendant's further and separate answer and defense to plaintiffs'

second cause of action, plaintiffs reply and allege as follows:

I.

That in the bankruptcy proceedings of I. Gevurtz & Sons, instituted in the District Court of the United States for the District of Oregon, the said defendant, on or about the 29th day of May, 1913, filed a proof of claim in said proceedings, wherein it alleged its liability for the payment of the note set forth in plaintiffs' complaint, and upon its representation in that regard made, its claim, based on said liability, was allowed; and that the said defendant thereafter received and retained dividends upon said claim so claimed and allowed as aforesaid, and that thereby the said defendant is estopped of record from setting up the alleged want of authority of the President of said Multnomah Hotel Company, a corporation, to execute the said note on behalf of the said corporation, or to otherwise attack the validity of said note.

WHEREFORE, Plaintiffs pray for judgment against said defendant as set forth in its complaint.

(Signed) JULIUS SILVERSTONE

(Signed) SIDNEY TEISER.

Of Attorneys for Plaintiffs.

(Endorsed) Filed Dec. 20, 1916.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 1st day of March, 1917, there was duly filed in said court and cause a Stip-

ulation in words and figures as follows (omitting title and formal parts) to-wit:

STIPULATION WAIVING JURY TRIAL

This stipulation entered into this 1st day of March, 1917, by and between plaintiffs and defendant, through their respective counsels.

WITNESSETH: That whereas, stipulation has heretofore been entered into, in open court, at the time the above entitled cause was set for trial by and between counsel for plaintiff and counsel for defendant, whereby trial by jury was waived and whereby said cause was set as a cause to be heard without jury and it appearing that the requirements of law necessitates a waiver in writing of trial by jury.

NOW, THEREFORE, trial by jury of the issues in the above entitled cause be and the same is hereby waived, and the parties hereby consent to a trial of said cause by the court without jury.

SIDNEY TEISER,

Of Attorneys for Plaintiffs.

CECIL H. BAUER,

Of Attorneys for Defendant.

(Endorsed) Filed March 1, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 21st day of May, 1917, there was duly filed in said court and cause an Opinion on the Merits which (omitting title and formal parts) is in words and figures as follows, to-wit:

OPINION ON THE MERITS

The plaintiffs bring this action to recover against the defendant upon a promissory note executed by the Multnomah Hotel Company, Philip Gevurtz and I. Gevurtz & Sons, of which the Hotel Company is principal and the other two are accommodation makers. I. Gevurtz & Sons is a corporation. At the time of the execution of the note and the transactions now to be noticed, the defendant corporation was the owner of the Multnomah Hotel in Portland, Oregon, and the Multnomah Hotel Company was a lessee of the hotel from it. I. Gevurtz & Sons was the owner of all the common stock and all but 50 shares of the preferred stock of the Multnomah Hotel Company, and on January 10, 1913, gave to the defendant an option to purchase all the common and preferred stock of the company at the price of \$175,000. This option ripened into an agreement between the parties, whereby I. Gevurtz & Sons sold to the R. R. Thompson Estate Company all the common and preferred stock of the Multnomah Hotel Company at the figure named in the option. In such sale it was agreed that the defendant company should have the right, in paying the \$175,000, to apply the same towards the payment of the indebtedness of the Hotel Company, and it was further agreed, in effect, that the defendant company would advance to I. Gevurtz & Sons the further sum of \$35,000 on its promissory note, the same to be also applied in discharge of the Hotel Company's indebtedness and liabilities, and in addition that I. Gevurtz & Sons would guarantee, indemnify, and save harmless the defendant

company against the payment of any further debts and liabilities of the Hotel Company, over and beyond the aggregate of the consideration price to be paid for said stock and the \$35,000 to be advanced; the purpose being, as expressed by the option, that the defendant company should obtain good title to the property and assets of the Hotel Company free and clear of all claims, liabilities, and indebtedness, of whatever character or nature. The note and guaranty were given, and the defendant company disbursed the funds which it retained in its hands, namely, the \$175,000 consideration and the \$35,000, towards the payment of the liabilities of the Hotel Company, and paid liabilities largely beyond these sums in pursuance of the guaranty, but has refused to pay the demand of the plaintiffs on the promissory note of the Hotel Company and its accommodation makers.

The defendant company having answered, the cause was submitted to the court without the interposition of a jury.

At the trial it was shown that I. Gevurtz & Sons had been adjudged a bankrupt, and that the defendant company presented a claim against the estate of the bankrupt, which was held by the referee to be provable, which comprised the entire liabilities of the Hotel Company, including the demand of the plaintiffs on the note here sued upon, basing its claim upon the promissory note of I. Gevurtz & Sons for \$35,000, the agreement of sale of the common and preferred stock of the Hotel Company, and the guaranty and indemnity by I. Gevurtz & Sons against the payment of any and

all indebtedness and liability of the Hotel Company. Further than this, the defendant has received from the trustee of the estate of I. Gevurtz & Sons a dividend of 23 per cent upon all such indebtedness, including the claim which plaintiffs are now suing to recover.

The questions are presented, first, whether the defendant company assumed the payment of the indebtedness or liabilities of the Hotel Company; and, second, whether the defendant company, through and by virtue of its transactions with I. Gevurtz & Sons, rendered itself liable directly to the creditors of the Hotel Company, they being third or outside parties to the dealings between the defendant company and I. Gevurtz & Sons.

On the first question, counsel for the defendant company say that:

“The option, the resolutions of the stockholders and directors of I. Gevurtz & Sons, and the written indemnity all negative the proposition that there was an assumption of the debts of creditors of I. Gevurtz & Sons by the Thompson Estate Co. in excess of the purchase price for the stock, namely, \$175,000.”

This is an admission that the defendant company did assume the debts of such creditors up to the amount of \$175,000. But, considering the manner in which the transactions were handled, it is manifest that there was an assumption of the entire indebtedness of the Hotel Company. The purpose of the defendant company, and such was the intendment of the agreement of the parties, was to obtain the stock without impairment

of its value because of any impending liabilities of the Hotel Company, and when the note of \$35,000 was given, the defendant company retained in its possession the fund arising therefrom, and disbursed it in payment of the creditors of the Hotel Company. None of it was paid directly to I. Gevurtz & Sons. And as to the indemnity, it operated to reimburse the defendant company in the payment of any liabilities of the Hotel Company beyond the aforesaid amount of \$175,000 plus the \$35,000 disbursed by the defendant company. I am impressed that these transactions import by implication an assumption on the part of the defendant company of the liabilities of the Hotel Company, not only up to the amount of \$175,000, but also of all its liabilities beyond that amount.

It is very true, as counsel for defendant contends, that where there is only an executory contract entered into between two parties, whereby one of the parties for a consideration moving from the other agrees to pay the debt of a third, the third party has no right of action against the promisor. *Washburn v. Investment Company*, 26 Or. 436; *Brower Lumber Co. v. Miller*, 28 Or. 565.

But it is settled law now in this state that, where a person has received from another some fund, property or thing, in consideration of which he has made a promise or entered into an undertaking with such other, but primarily and directly for the benefit of a third, such third party may maintain an action directly upon such promise or undertaking so made and en-

tered into for his benefit, although not a party to the transaction.

“In such case,” as was said in *Feldman v. McGuire*, 34 Or. 309, “the third party acquires an equitable interest in the property, fund, or thing; and the law, acting upon the relationship of the parties and their treatment of the fund, establishes the requisite privity, creates a duty, and implies a promise which will support the action.”

The doctrine has been treated of as well in the two cases first above cited, and in *Parker v. Jeffery*, 26 Or. 186, and *Kiernan v. Kratz*, 42 Or. 474, and there has been no modification of it that I am aware of in recent years.

Applying the principle here, there was in legal tendment a fund created and left in the hands of the defendant company for the payment of all the liabilities of the Hotel Company, and for that reason the defendant company was rendered liable directly to all the creditors of the Hotel Company, including the plaintiffs. Nor is the undertaking or promise thus implied within the statute of frauds. *Feldman v. McGuire*, *supra*.

(Endorsed) Filed May 21, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on May 21, 1917, there was duly filed in said court and cause Findings of Fact which (omitting title and formal parts) are in words and figures as follows, to-wit:

FINDINGS OF FACT.

This cause coming on to be heard, before the court without the intervention of a jury, and the court having heard the testimony and the argument of counsel, and now being sufficiently advised in the premises, finds for the plaintiffs in the sum of \$4736.38, and the further sum of \$475.00 as a reasonable attorney's fee.

(Signed) CHAS. E. WOLVERTON,

Judge.

(Endorsed) Filed May 21, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on May 21, 1917, there was duly filed in said court and cause a Judgment Order which (omitting title and formal parts) is in words and figures as follows, to-wit:

JUDGMENT ORDER

May 21st, 1917.

This cause was tried before the Court without the intervention of a jury upon the proceedings and the proofs; plaintiff appearing before Mr. Sidney Teiser and Mr. Julius Silverstone of counsel and defendant appearing before Mr. Cecil Bauer and Mr. A. H. McCurtain of counsel, and the court being fully advised in the premises now files therein its findings of fact in words and figures as follows, to-wit:

"This cause coming on to be heard before the Court without the intervention of a jury and the Court having heard the testimony and the argument of counsel, and

now being sufficiently advised in the premises finds for the plaintiffs in the sum of Forty-seven Hundred Thirty-six and 38/100ths Dollars and the further sum of Four Hundred Seventy-five and 00/100ths Dollars as a reasonable attorney's fee.

CHAS. E. WOLVERTON,

Judge.

WHEREUPON IT IS ADJUDGED that said plaintiff do, have and recover of and from said defendant the sum of Forty-seven Hundred Thirty-six and 38/100ths Dollars and the further sum of Four Hundred Seventy-five and 00/100ths Dollars as a reasonable attorney's fee and their costs and disbursements therein taxed in the sum of \$. and their execution issued therefor.

(Endorsed) Filed May 21, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 8th day of June, 1917, there was duly filed in said court and cause Motion to Vacate Judgment and for a New Trial which (omitting title and formal parts) is in words and figures as follows, to-wit:

MOTION TO VACATE JUDGMENT AND FOR A NEW TRIAL

Comes now the defendant by its attorneys, and moves the court for an order vacating and setting aside the general findings and the judgment heretofore made and

entered herein for a new trial and a re-hearing, and assigns as the grounds thereof the following:

I.

That the court erred in its finding to the effect that there was an assumption of the entire indebtedness of the Multnomah Hotel Company by the defendant company, or any indebtedness in excess of the sum of \$175,000.00.

II.

That the court erred in its finding to the effect that the transactions between the Multnomah Hotel Company and the defendant company imported by implication an assumption of the liabilities of the Multnomah Hotel Company by the defendant company in excess of \$175,000.00.

III.

That the court erred in its conclusion to the effect that there was in legal intendment a fund created and left in the hands of the defendant company for the payment of liabilities of the Multnomah Hotel Company, or any liabilities in excess of the sum of \$175,000.00.

IV.

That the court erred in its conclusion that the undertaking of the defendant was not within the Statute of Frauds.

V.

That the court erred in its finding and conclusion to the effect that the plaintiff is entitled to a judgment, and in not finding that the defendant was entitled to a judgment.

BAUER & GREENE and
A. H. McCURTAIN,
Attorneys for Defendant.

(Endorsed) Filed June 8, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 11th day of June, 1917, there was duly filed in said court and cause Findings of Fact Proposed by Plaintiff in Error which (omitting title and formal parts) are in words and figures as follows, to-wit:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROPOSED BY PLAINTIFF IN ERROR

The defendant respectfully requests the court to make, file and enter the following Findings of Fact and Conclusions of Law in the above styled cause:

FINDINGS OF FACT.

I.

That on or about the 10th day of January, 1913, I. Gevurtz & Sons, a corporation, being the owners of all of the common capital stock of Multnomah Hotel

Company, a corporation, by an instrument in writing, gave an option to the defendant corporation for the purchase of all of the stock of said Multnomah Hotel Company for the sum of \$175,000.00 in cash, which said option further provided that the said defendant company should have the right in paying said \$175,000.00 to apply the same towards the payment of the indebtedness of said Multnomah Hotel Company to the First National Bank of Portland, Oregon, and to all other creditors of said company, to the extent of said sum of \$175,000.00, and any and all other indebtedness or liabilities of said Multnomah Hotel Company up to the date of the transfer of said stock was to be paid by said I. Gevurtz & Sons, and which option further provided that if said I. Gevurtz & Sons should not be in position to pay the said indebtedness as the same became due, the said defendant company would advance necessary moneys to pay and discharge same for said I. Gevurtz & Sons upon the execution of its promissory note to the defendant company for all of said sums of money so required, provided, however, that said amounts shall not exceed in the aggregate the sum of \$35,000.00, and provided, further, that said I. Gevurtz & Sons should warrant and guarantee the said defendant company against any and all indebtedness and liabilities of said Multnomah Hotel over and above the aggregate amounts of \$175,000.00, the consideration of the purchase price of said stock, and \$35,000.00 to be advanced by it, the defendant company, to said I. Gevurtz & Sons to entitle it to pay and liquidate the obligations of said hotel in excess of the purchase price

of the stock, and said contract further provided that it was the intention that in selling all of the common and preferred stock of the Multnomah Hotel Company to said defendant company, for the sum of \$175,000.00, as aforesaid, the said The R. R. Thompson Estate Company should thereby obtain good title to all of the property and assets of the Multnomah Hotel Company, free and clear of all claims, demands, liabilities, liens or indebtedness of any character or nature whatsoever, and that any and all other such debts, liabilities, liens or indebtedness should be assumed and paid by said I. Gevurtz & Sons, and that the advance by the defendant company of the additional sum of \$35,000.00 should be only as a matter of accommodation to I. Gevurtz & Sons, and should not be any acknowledgment of any assumption by said defendant company of any further liabilities, or for the payment of any greater sum for the assets of the Multnomah Hotel Company than represented by the purchase price of said common and preferred stock.

II.

That subsequent to the giving of the option as set forth in finding No. 1, the said option ripened into an agreement between the parties, and said I. Gevurtz & Sons transferred and delivered to the defendant company all of the common and preferred stock of the Multnomah Hotel Company, in accordance with the terms of said option, and that thereafter the defendant company paid to the creditors of said Multnomah Hotel Company the sum of \$175,000.00, and in addition thereto paid to the creditors of the Multnomah Hotel Com-

pany the sum of \$35,000.00, and took from I. Gevurtz & Sons, a corporation, its promissory note in the sum of \$35,000.00, to cover said advances, and that thereafter said defendant company paid divers other creditors of the Multnomah Hotel Company, but refused to pay the claim of the plaintiff herein.

III.

That there was no contract or memorandum in writing, signed by the defendant company, whereby the defendant company agreed to pay any indebtedness of the Multnomah Hotel Company.

IV.

That on the 16th day of February, 1913, the said I. Gevurtz & Sons duly made, executed and delivered to the defendant company its contract in writing, by the terms of which it was provided that it, the said I. Gevurtz & Sons, would indemnify and save the defendant company, and its successors and assigns, free and harmless against any and all indebtedness and liabilities of the Multnomah Hotel Company and against all claims or demands, actions, damages, liabilities, suits, fines, liens and contracts of indebtedness of any character whatsoever, either due to I. Gevurtz & Sons directly or indirectly, or to any other person, firm or corporation arising out of or incurred in the operation of said Multnomah Hotel Company from the time of its beginning to the date of the delivery of possession of all its common and preferred stock by I. Gevurtz & Sons to the defendant company, over and above the

sum of \$210,000.00, being the aggregate amount of the purchase price of said common and preferred stock, to-wit: \$175,000.00, and the amount of \$35,000.00 advanced and loaned by said defendant company to said I. Gevurtz & Sons, and by which contract the said I. Gevurtz & Sons bound itself to pay any and all indebtedness or liabilities which might remain unpaid or be in excess of the amount of \$210,000.00, to be applied as in said contract provided.

V.

That on or about the 9th day of May, 1913, said I. Gevurtz & Sons was adjudged a bankrupt, and the defendant company presented a claim against the estate of said bankrupt, which was held to be provable by the referee, which comprised the entire liabilities of the Multnomah Hotel Company, including the demands of the plaintiff on the note herein sued upon, the said defendant basing its claim in said bankruptcy proceedings upon the promissory note of I. Gevurtz & Sons for \$35,000.00, the agreement of sale of the common and preferred stock of Multnomah Hotel Company and the guaranty and indemnity by I. Gevurtz & Sons against the payment of any and all indebtedness and liabilities of the Multnomah Hotel Company, the said claim having been allowed, the defendant received a dividend from the trustee of the estate of I. Gevurtz & Sons, in bankruptcy, of 23% of all such indebtedness, including the claim which plaintiffs are now seeking to recover.

VI.

That subsequent to date of the payments of said dividends as set forth in finding numbered V, the Multnomah Hotel Company paid to the plaintiff on account of the note here sued upon, \$1000.00.

VII.

Subsequent to the bankruptcy of I. Gevurtz & Sons the Multnomah Hotel Company continued in business for a period of approximately thirty-two months, during which time the plaintiff herein made no attempt to collect its note against the said Hotel Company, and on or about the 26th day of January, 1916, the Multnomah Hotel Company was adjudged a bankrupt.

From the foregoing Findings of Fact the court finds and makes the following Conclusions of Law:

CONCLUSIONS OF LAW.

I.

That the defendant company did not assume any of the liabilities of the Multnomah Hotel Company, or agree to pay the same in excess of the sum of \$175,000.00.

II.

That there was no fund created in the hands of the defendant company for the payment of the liabilities of the Multnomah Hotel Company in excess of the sum of \$210,000.00.

III.

That there was no memorandum or other contract in writing, signed by the defendant company, undertaking or agreeing to pay any of the indebtedness of the Multnomah Hotel Company, and that any assumption or promise made by the defendant company is unenforceable at law because coming within the Statute of Frauds.

IV.

That the plaintiff cannot maintain its action against the defendant company, and the defendant company is entitled to a judgment dismissing the plaintiff's complaint, and for its costs and disbursements.

.....
Judge.

(Endorsed) Filed June 11, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 11th day of June, 1917, the court made and rendered its Opinion herein which (omitting title and formal parts) is in words and figures as follows, to-wit:

OPINION OF THE COURT

Julius Silverstone and Sidney Teiser for Plaintiffs.
Bauer & Greene and A. H. McCurtain for Defendant.

WOLVERTON, District Judge: (Orally)

There are two cases bearing upon this subject, which I have examined, and one is the case cited by counsel this morning—*Humphreys v. Third National Bank of Cincinnati, Ohio*, found in 75 Federal at page 852. That is a case in the Circuit Court of Appeals for the Sixth Circuit. In that case Judge Taft intimates that the practice has resulted in a sort of trap to catch the unwary, although upon consultation of the decisions of the Supreme Court of the United States every lawyer ought to be advised of the practice.

Of course, it is my purpose to avoid entrapping counsel or the parties into a situation that would prevent them from presenting their case in full in the Court of Appeals.

Now, there are two ways of raising the questions which it is proposed to raise in this case. The question that is desired to be raised primarily is whether or not the testimony in the case supports the verdict. That is the effect of it. One way of raising that question is, as pointed out by Judge Taft in his opinion, by request to the court to direct a verdict on the ground of insufficiency of the evidence. That is a motion that is often made when a jury is called and the trial is before a jury, and it is a motion that could have been made in this case; and I do not think that the court at this time would be warranted in setting aside this verdict for the purpose of allowing that motion to be made. The other manner in which the question might be raised is by presenting to the court findings, and then the court may pass upon those findings. If the court refuses

to make the findings, then that may be reserved by exception, and that would raise the entire question.

I rather think in this case, in order that the matter may be fully presented, that the verdict should be set aside, and the court will refuse these findings which have been tendered, and then the court will make the same general findings as it made before, and the judgment may be entered as of this date. The clerk will make a copy of those findings, so that I can sign them, the general findings, and that will make up the record of the court.

(Endorsed) Filed June 11, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 11th day of June, 1917, there was duly filed in said court and cause an Order which (omitting title and formal parts) is in words and figures as follows, to-wit:

ORDER VACATING JUDGMENT

This cause came on regularly to be heard this 11th day of June, 1917, on motion of defendant for an order vacating and setting aside the general Findings and the Judgment heretofore made and entered herein and for a new trial and rehearing, plaintiff appearing by Sidney Teiser of counsel, and the defendant by Thomas G. Greene of counsel, and the court having considered the said motion and being fully advised in the premises; and it appearing to the court that said motion should be allowed for the purpose of affording said defendant an opportunity to present proposed special Findings of

Fact and Conclusions of Law, and for the further purpose of permitting defendant, should the court fail or refuse to sign the proposed special Findings of Fact and Conclusions of Law as prayed, to request special Findings in conformity with the general Verdict or Findings heretofore made and filed, whereupon

IT IS ORDERED

that said motion, so far as it prays for the setting aside of the general Findings and Judgment, be and the same is hereby allowed, and the said general Verdict or Findings and Judgment heretofore entered on the 21st day of May, 1917, be and the same are hereby vacated and set aside.

And the defendant having thereupon requested the court to make, sign and file special Findings of Fact and Conclusions of Law, as proposed by the defendant, which proposed Findings of Fact and Conclusions of Law are on file with the Clerk of this Court,

IT IS ORDERED

that the request of said defendant of the court to make, sign or file the said Findings of Fact and Conclusions of Law, or either of them, proposed by said defendant, be and the same is hereby declined and refused;

And it further appearing that the defendant thereupon requested the court to make, sign and file special Findings of Fact and Conclusions of Law herein, in accordance with the general Findings or Verdict heretofore entered and herein vacated for the purposes afore-

said, and it appearing that the court had determined, in its discretion, that special Findings or Conclusions in said cause were unnecessary

IT IS ORDERED

that the request of the defendant for the making, signing and filing of special Findings of Fact and Conclusions of Law in accordance with said general Findings or Verdict be, and the same is hereby refused.

And it further appearing that the defendant duly objected and excepted to the orders herein made, and to the court's refusal to make, sign or file either or all of the said Findings of Fact and Conclusions of Law proposed by it separately, and further excepted to the making of the order refusing to make, sign, and file special Findings of Fact and Conclusions of Law in conformity with the general Verdict or Findings heretofore entered herein, and for the purpose aforesaid, herein vacated

IT IS FURTHER ORDERED

that defendant be, and it hereby is allowed exceptions to said order,

And it further appearing that the purpose of vacating said finding and judgment having now been fully accomplished, and the Court having heretofore heard the evidence adduced and the arguments of counsel and now being fully advised in the premises, now makes and files the following findings, viz.:

"This cause coming on to be heard before the Court without the intervention of a jury and the Court having heard the testimony and argument of counsel, and now being sufficiently advised in the premises finds for the plaintiffs in the sum of Forty-seven Hundred Thirty-six and $38/100$ ths Dollars and the further sum of Four Hundred Seventy-five and $00/100$ ths Dollars as a reasonable attorney's fee.

CHAS. E. WOLVERTON,

Judge.

WHEREUPON, based upon the foregoing finding, it is adjudged that said plaintiffs do, have and recover of and from said defendant said sum of Forty-seven Hundred Thirty-six and $38/100$ ths Dollars and the further sum of Four Hundred Seventy-five and $00/100$ ths Dollars as a reasonable attorney's fee, together with their costs and disbursements therein taxed at \$32.66 and that they have execution therefor.

(Signed) CHAS. E. WOLVERTON,

Judge.

(Endorsed) Filed June 11, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 11th day of June, 1917, there was duly filed in said court and cause a Finding by the Court which (omitting title and formal parts) is in words and figures as follows, to-wit:

FINDING BY THE COURT

This cause coming on to be heard before the court without the intervention of a jury and the court having heard the testimony and the argument of counsel and now being sufficiently advised in the premises finds for the plaintiff in the sum of \$4736.38 and the further sum of \$475.00 as a reasonable attorney's fee.

(Signed) CHAS. E. WOLVERTON,

Judge.

(Endorsed) Filed June 11, 1917.

G. H. MARSH. Clerk.

That thereafter, to-wit, on the 21st day of June, 1917, there was duly filed in said court and cause a Petition for Writ of Error which (omitting title and formal parts) is in words and figures as follows, to-wit:

PETITION FOR WRIT OF ERROR

To the HON. CHAS. E. WOLVERTON, United States District Judge:

The above named defendant, The R. R. Thompson Estate Company, a corporation, feeling itself aggrieved by the finding and judgment rendered and entered in the above entitled cause on the 11th day of June, 1917, does hereby petition for a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and prays that the said writ of error be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and

documents upon which said finding and judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such court in such cases made and provided, and your petitioner further prays that the proper order relating to the required security to be required of it be made, and that upon the filing of proper security your honor sign supersedeas order herein.

BAUER & GREENE, and
A. H. McCURTAIN,

Attorneys for Defendant.

(Endorsed) Filed June 21, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 21st day of June, 1917, there was duly filed in said court and cause Assignments of Error which (omitting title and formal parts) are in words and figures as follows, to-wit:

ASSIGNMENTS OF ERROR

Now comes the defendant in the above entitled cause, and files the following assignment of errors upon which it will rely in its prosecution of writ of error in the above entitled cause from the finding and judgment made by this honorable court on the 11th day of June, 1917.

I.

That the United States District Court for the District of Oregon erred in admitting any evidence under the complaint filed in this cause, and in not holding

that the said complaint did not state facts sufficient to constitute a cause of action.

II.

That the said court erred in admitting and receiving in evidence promissory note of the Multnomah Hotel Company, a corporation, payable to the plaintiffs, and endorsed by Philip Gevurtz and I. Gevurtz & Sons, a corporation, marked plaintiffs' Exhibit A.

III.

That the said court erred in admitting and receiving in evidence the checks of the plaintiffs payable to the Multnomah Hotel Company, marked plaintiffs' Exhibits B and C.

IV.

That the said court erred in admitting and receiving in evidence the claims of the defendant filed in the bankruptcy matter of I. Gevurtz & Sons, marked plaintiffs' Exhibits D and E.

V.

That the said court erred in admitting and receiving in evidence stipulation between the attorneys for the trustee of the bankrupt estate of I. Gevurtz & Sons and the attorneys for the defendant, marked plaintiffs' Exhibit F.

VI.

That the said court erred in admitting and receiv-

ing in evidence a memorandum of authorities in behalf of the defendant in support of its claim in the bankruptcy proceeding of I. Gevurtz & Sons, and marked plaintiffs' Exhibit G.

VII.

That the said court erred in admitting and receiving in evidence the order of the Referee in Bankruptcy allowing the claim of the defendant in the matter of the bankruptcy of I. Gevurtz & Sons, and marked plaintiffs' Exhibit H.

VIII.

That the said court erred in admitting and receiving in evidence the dividend sheets of I. Gevurtz & Sons, marked plaintiffs' Exhibits I and J.

IX.

That the said court erred in admitting and receiving in evidence the schedules in bankruptcy of the Multnomah Hotel Company marked plaintiffs' Exhibit K.

X.

That the said court erred in failing and refusing to make, sign and file the special findings of fact proposed by the defendant, being numbered from 1 to 7 inclusive, and each of said findings of fact.

XI.

That the said court erred in failing and refusing to make, sign and file the conclusions of law proposed by

the defendant, and numbered from 1 to 4 inclusive, and each of them.

XII.

That the court erred in failing and refusing to make, sign and file special findings of fact in support of the general findings and judgment entered by the court herein.

XIII.

That the said court erred in holding that there was any evidence introduced at the trial to support the complaint or any judgment for the plaintiff.

XIV.

That the said court erred in not entering judgment for the defendant and against the plaintiff.

WHEREFORE, Defendant prays that said judgment be reversed, and that said District Court of the United States for the District of Oregon be ordered to enter a judgment reversing its decision and in favor of the defendant and against the plaintiff.

BAUER & GREENE, and

A. H. McCURTAIN,

Attorneys for the Plaintiff in Error.

(Endorsed) Filed June 21, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 22nd day of June, 1917, there was duly filed in said court and cause Order

Allowing Writ of Error which (omitting title and formal parts) is in words and figures as follows, to-wit:

ORDER ALLOWING WRIT OF ERROR

On motion of A. H. McCurtain, of attorneys and counsel for defendant, it is hereby

ORDERED that a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, from the findings and judgment heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings, be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit.

And it is further **ORDERED** that the bond to be filed by the defendant be fixed in the sum of \$6000.00; and it is further

ORDERED that the Clerk of this court issue writ of error herein as by law required.

CHAS. E. WOLVERTON,

District Judge.

Endorsed) Filed June 21, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 22nd day of June, 1917, there was duly filed in said court and cause a Writ of Error which (omitting title and formal parts) is in words and figures as follows, to-wit:

WRIT OF ERROR

The United States of America,—ss.

The President of the United States of America,

To the Judges of the District Court of the United States for the District of Oregon, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Charles E. Wolverton, one of you, between Louise Weinhard and Anna Wessinger, Paul Wessinger and Henry Wagner, Executrices and Executors, respectively of the last Will and Testament of Henry Weinhard, deceased, plaintiffs and defendants in error and The R. R. Thompson Estate, a corporation, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error as by complaint doth appear, and we being willing that error, if any, hath been, should be corrected and full and speedy justice done to the parties aforesaid and in this behalf do command you if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid being one and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what if right

and according to the laws and customs of the United States of America should be done.

Witness, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 22nd day of June, A. D. 1917.

(Signed) G. H. MARSH,

Clerk of the District Court of the United States
for the District of Oregon.

(Seal)

(Endorsed) Filed June 22, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 22nd day of June, 1917, there was duly filed in said court and cause a Bond which (omitting title and formal parts) is in words and figures as follows, to-wit:

BOND

KNOW ALL MEN BY THESE PRESENTS:
That The R. R. Thompson Estate Company, a corporation, defendant in the above entitled action, as Principal, and THE MASSACHUSETTS BONDING & INSURANCE COMPANY OF BOSTON, MASSACHUSETTS, a corporation, duly organized and existing under and by virtue of the laws of the State of Massachusetts, and as such corporation authorized to do business, and doing business in the State of Oregon, as Surety, are held and firmly bound unto Louise Weinhard and Anna Wessinger, Paul Wessinger and Henry Wagner, Executrices and Executors,

respectively of the last Will and Testament of Henry Weinhard, deceased, plaintiffs in the above entitled action, in the sum of Six Thousand Dollars (\$6000.00), to be paid unto the said plaintiffs, their administrators or assigns, and for the payment of which sum well and truly to be made we bind ourselves and each of us, and our and each of our successors and assigns, jointly and severally, firmly by these presents.

SEALED with our seals, and dated this 11th day of June, 1917.

WHEREAS, the said defendant in the above entitled action has prosecuted or is about to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the findings and judgment rendered and entered in the above cause on the day of June, 1917, which said finding and judgment is hereby referred to and made a part hereof,

NOW THEREFORE, the condition of this obligation is such that if said defendant in the above entitled action shall prosecute its said writ of error to effect and answer all damages and costs if it fails to make said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

The R. R. Thompson Estate Company,
a Corporation,

(Signed) By A. H. McCurtain,
Of its Attorneys.

The Massachusetts Bonding & Insurance Company
 of Boston, Massachusetts, a Corporation,
 (Signed) By Frank E. Smith,
 Its Attorney-in-Fact.

Approved this 22nd day of June, 1917.

(Signed) CHAS. E. WOLVERTON,
 Judge.

(Endorsed) Filed June 22, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 22nd day of June, 1917, there was duly filed in said court and cause an Order of Supersedeas which (omitting title and formal parts) is in words and figures as follows, to-wit:

ORDER OF SUPERSEDEAS

This cause coming on to be heard this 21st day of June, 1917, upon the application of the plaintiff in error for a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and said writ of error having been allowed, it is

ORDERED that the same shall operate as a supersedeas, the said plaintiff in error having executed bond in the sum of \$6000.00 as provided by law, and the Clerk is hereby directed to stay the mandate of the District Court of the United States for the District of Oregon until the further order of this court.

(Signed) CHAS. E. WOLVERTON,
 District Judge.

(Endorsed) Filed June 22, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 22nd day of June, 1917, there was duly filed in said court and cause a Citation on Writ of Error which (omitting title and formal parts) is in words and figures as follows, to-wit:

CITATION ON WRIT OF ERROR.

United States of America,
District of Oregon,—ss.

To Louise Weinhard and Anna Wessinger, Paul Wessinger and Henry Wagner, Executrices and Executors, respectively of the last Will and Testament of Henry Weinhard, deceased, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Circuit Court of the United States for the District of Oregon, wherein The R. R. Thompson Estate Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 22nd day of June, in the year of one Lord, one thousand, nine hundred and seventeen.

(Signed) CHAS. E. WOLVERTON,

Judge.

Service of the foregoing citation is hereby accepted in Portland, Oregon, this 22nd day of June, 1917.

(Signed) SIDNEY TEISER,

Of Attorneys for Defendant in Error.

(Endorsed) Filed June 22, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 16th day of July, 1917, there was duly filed in said court and cause an Order for 'Time to File 'Transcript which (omitting title and formal parts) is in words and figures as follows, to-wit:

ORDER FOR TIME TO FILE TRANSCRIPT.

For sufficient cause shown, it is hereby

ORDERED that the plaintiff in error have to and including the 31st day of August, 1917, within which to prepare and file its transcript of the record and evidence in the Circuit Court of Appeals in the above entitled cause.

Dated at Portland, Oregon, this 16th day of July, 1917.

(Sg.) CHAS. E. WOLVERTON,

District Judge.

(Endorsed) Filed July 16, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 2nd day of August, 1917, there was duly filed in said court and cause a Bill of Exceptions and Statement of Facts, which (omit-

ting title and formal parts) is in words and figures as follows, to-wit:

BILL OF EXCEPTIONS AND STATEMENT OF FACTS.

BE IT REMEMBERED, that the above entitled action came duly and regularly on for trial on the 27th day of March, 1917, plaintiffs appearing by Sidney Teiser and J. Silverstone, their attorneys, and the defendant appearing by Bauer & Greene and A. H. McCurtain, its attorneys, and trial by jury having been waived in writing by both plaintiffs and defendant, whereupon after the statement of the cause by the attorneys for the plaintiffs and the defendant, respectively, the following proceedings were had, to-wit:

Mr. Teiser: Do I understand that you will not take the position that Philip Gevurtz had no authority to sign that note, or do you waive that?

Mr. McCurtain: We will waive that. There was some answer filed here, your Honor, going to the question of the authority of Philip Gevurtz, as president of the corporation, to sign this note, but we waive that proposition.

We would, however, your Honor, at this time ask your Honor to make an order requiring the plaintiffs to elect as to whether they will proceed upon the cause of action first stated in their complaint or upon the second cause of action therein stated. We take the position in that behalf that the two causes of action are absolutely at variance and antagonistic to each other. The

theory of the first cause of action is that the Thompson Estate Company, the defendant, agreed to pay these debts in excess of \$210,000, and they state specifically in the second cause of action that the debts did not amount to \$175,000.

Mr. Teiser: If your Honor please, this matter was argued before Judge Bean at length on one occasion, on the same motion. Judge Bean denied the motion, and stated that he would reserve the right at the trial to strike out one of other of the causes of action if it became apparent it should be done. In other words, he overruled the motion without prejudice, I suppose. Now, your Honor will note that there is not anything contradictory in this complaint whatsoever. The first cause of action states that the R. R. Thompson Estate Company agreed to pay the debts of the Hotel Company in excess of \$210,000. That is all it says. There is no statement at all there that the debts were in excess of that sum or under it. I defy counsel to find anywhere in that complaint any statement anywhere that the debts were over \$175,000. Our theory was that it didn't make any difference whether or not the debts were more than \$210,000, but if they were, we ought to recover on it on the grounds of their assumed promise. It is not necessary for us to go out of our way to show that. All that is necessary for us to do, and we maintain we have a right to rely on that situation, is that there was \$175,000 worth of debts. Now, there isn't anything inconsistent in those two causes of action. They can both be tried here and heard here.

COURT: It is not entirely clear in my mind at the

present time. I see no reason why this matter may not proceed, and if in the course of the trial it should develop the court can make the order at that time.

Mr. McCurtain: I think there is no reason, your Honor, why you should not proceed with the evidence, and reserve your ruling in any event. But we want, for the purpose of preserving the record, to show we make the motion at this time.

COURT: Very well.

PAUL WESSINGER, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Teiser:

State your name and residence.

A. Paul Wessinger, Portland, Oregon.

Q. Mr. Wessinger, you are one of the executors of the estate of Henry Weinhard, deceased?

A. Yes, sir.

Q. And as such are one of the plaintiffs in this action?

A. Yes, sir.

Q. Mr. Wessinger, is the note I now hand you the note which is the subject of this suit?

A. Yes, sir.

Mr. Teiser: I ask that that be marked for identification, and introduced in evidence as "Plaintiffs' Exhibit A."

COURT: What is the amount?

A. \$4500. The note is made March 6, 1912, isn't it?

Mr. Teiser: Yes. I now introduce this note in evidence.

Mr. McCurtain: Your Honor, we object to the introduction of this note, or any evidence under the allegations of the complaint, on the ground that the complaint does not state facts sufficient to constitute a cause of action. I want to make that general objection for the purpose of the record.

COURT: You are not insisting upon it?

Mr. McCurtain: I want to insist upon it, yes, your Honor, but I assume that your Honor will perhaps want to rule on that as you did on the motion to elect. I cannot see how this note can bind the Thompson Estate Company.

COURT: The court will overrule your objection, and you may have an exception.

Mr. McCurtain: Very well, your Honor. I do not want to be making objections all the time, and delay the procedure of the court, but we want that objection to go to the introduction of any testimony supporting the issues of the complaint. Your Honor will overrule it, and hear the evidence.

COURT: That may be understood.

Which said note marked Exhibit "A" is in words and figures as follows, to-wit:

\$4500.00

Portland, Ore., Mar. 6th, 1912.

On demand after date, without grace, we or either of us promise to pay to the order of Louise Weinhard,

Anna Wessinger, Paul Wessinger and Henry Wagner, Executrices and Executors, respectively, of the last Will and Testament of Henry Weinhard, deceased, at Portland, Oregon. Forty-five Hundred and no/100 Dollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin at the rate of six per cent per annum from date until paid, for value received. Interest to be paid quarterly, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we or either of us promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum, in like Gold Coin, as the Court may adjudge reasonable, for attorney's fees to be allowed in said suit or action.

(Sgd) Multnomah Hotel Co.

Philip Gevurtz, Pres't.

(Ent 7/20/12)

Philip Gevurtz

I. Gevurtz & Sons

Philip Gevurtz, Pres't.

Endorsed as follows: May 4/1914 Rec'd on within note \$500. Oct. 6/1914 Rec'd on within note \$500.

Q. What was the consideration for that note, Mr. Wessinger?

A. Well, the note calls for \$4500, and we gave two checks of a total amount of \$4500.

Mr. Teiser: I don't know that these are material,

but I will introduce them so as to show the consideration.

A. Here is a note of \$2000 which I signed—

Q. A check?

A. And one of \$2500, total of \$4500, dated March 6, 1912, the same date as the note.

Q. You said “note”—you meant check?

A. Check. We signed the checks.

Q. And these two checks, amounting to \$4500, were given in return for the note which you have presented in evidence?

A. Yes, for the note; or for these the note was made out, for those two checks.

COURT: Who is the maker of the note?

Mr. Teiser: The Multnomah Hotel Company is the maker of the note, and it was also signed, as accommodation indorser, that is, the complaint says so, and I will bring that out in a minute, by Philip Gevurtz and I. Gevurtz & Sons. I introduce the two checks in evidence.

Mr. McCurtain: I make the objection that they are incompetent, irrelevant and immaterial.

COURT: Very well, the objection is overruled. They simply show the payment of the money in accordance with the note.

Which said checks were marked Exhibits “B” and “C” and are in words and figures as follows, to-wit:

Exhibit "B"

"HENRY WEINHARD BREWERY" No. 3966

Portland, Oregon, March 6, 1912.

Pay to the order of Multnomah Hotel Company
\$2000.00 Two Thousand and no/100 Dollars.

(Sgd) Estate Henry Weinhard, Dec'd

(Sgd) Paul Wessinger

(Sgd) Henry Wagner

Executors

THE UNITED STATES NATIONAL

Portland, Oregon.

Endorsed as follows: (Sgd) Multnomah Hotel
Company.

Stamped endorsement: (Paid Mar. 7, 1912, Port-
land, Oregon, First National Bank). (Pay to order
of First National Bank—452—Portland, Oregon. I
Gevurtz & Sons).

Exhibit "C"

"HENRY WEINHARD BREWERY"

Portland, Oregon, March 6, 1912.

Pay to the order of Multnomah Hotel Company
\$2500.00 Twenty-five Hundred and no/100 Dollars.

(Sgd) Estate Henry Weinhard, Dec'd

(Sgd) Paul Wessinger

(Sgd) Henry Wagner

Executors

THE UNITED STATES NATIONAL
Portland, Oregon.

Endorsed as follows: (Sgd) Multnomah Hotel Company.

Stamped endorsement: (Received payment through Clearing House March 8, 1912—4—. First National Bank). (Pay to order of First National Bank, Portland, Oregon. I Gevurtz & Sons)."

Q. To whom was the money advanced?

A. To Mr. Gevurtz. I think his name is Philip Gevurtz, Junior, is it not?

Q. I mean, to whom was this money given?

A. Oh, the money was made out to the Multnomah Hotel Company.

Q. To whom was the money loaned?

A. To the Multnomah Hotel Company.

Q. And how did it come that Philip Gevurtz individually and I. Gevurtz & Sons signed this note?

A. Well, we have a rule that for moneys loaned, for loans for notes, they have to be secured some way, either by property, as this was not, positively, in this way we took the individual indorsement of what we thought at the time responsible people; that is, Mr. Gevurtz and Gevurtz & Sons. That was done at my personal request.

COURT: Whom did you deal with in loaning this money to the company?

A. Mr. Gevurtz, the president of the Multnomah Hotel Company, came personally to my private office. I took him over to Mr. Wagner's.

COURT: How is that note signed?

Mr. Teiser: Multnomah Hotel Company, by Philip Gevurtz, President. It is also signed by Philip Gevurtz and I. Gevurtz & Sons.

CROSS EXAMINATION.

Questions by Mr. McCurtain:

Now, Mr. Wessinger, whom do you claim you loaned this money to—to I. Gevurtz & Sons or upon their credit, or to the Multnomah Hotel Company?

A. No, to the Multnomah Hotel Company.

Q. And in order to secure yourselves against loss on account of their inability to pay, you secured also the accommodation signature of I. Gevurtz & Sons and Philip Gevurtz? Is that right?

A. Yes sir. We thought it was security at the time, as I stated.

Q. You considered them good?

A. Yes.

Q. Now, at that time, Mr. Wessinger, isn't it a fact that you advanced to I. Gevurtz & Sons \$4500 or \$6000, and undertook to accept stock in the Multnomah Hotel Company?

A. No, no. The transaction was always—we had no reason to loan I. Gevurtz & Sons any money, but we had reasons for loaning the Multnomah Hotel Company money; and Gevurtz was there, and said that he intended dealing with the Henry Weinhard Brewery, and the note is made to the Henry Wienhard Estate; and naturally he would look for accommodations to those whom he was supposed to be dealing with, whom he in-

tended to be dealing with. Just like a bank—a bank loans money only to its own clients. So do we.

Q. That is to say, your policy was to get them into debt to you—to loan them money, and in that way they would buy beer and other—

A. I resent that kind of question. I didn't go to Mr. Gevurtz, Mr. Gevurtz came to me—to my private office—and asked for the loan. I didn't want to force anybody to accept money as a loan. That is all.

Q. I understand.

A. He came and asked, and we took it under consideration for several days till we said yes.

Q. Then I misunderstood you when you stated to the Court that your policy was that they would deal with you on account of doing business with them?

A. He came voluntarily. I didn't seek him. He came to my office of his own free will and made the statement that he intended to deal with us, and it was a big hotel—he expected large sales, and all that; and I think I was competent enough to judge properly about how much the sales could possibly amount to and all that, and with a view of facilitating the trade of the brewery, this loan was made.

Q. That is what I want to get at, yes. Now, what do you say as to whether it is a fact or not that at the time you advanced this \$4500, it was understood and agreed that you should take stock in the Multnomah Hotel Company to the extent of this advance?

A. Well, no, it was not exactly agreed, because if I had agreed to that it would have been carried out. There was talk about it.

Q. There were negotiations tending to that, but they were not consummated?

A. I mean, that was Mr. Gevurtz' proposition, and that part of Mr. Gevurtz' proposition was turned down. We didn't decide to take stock in it, but we said we had no objections to making a loan and—well, I stated all the balance before. We made the loan to the Multnomah Hotel Company, and had it endorsed as security.

REDIRECT EXAMINATION.

Q. I just want to ask Mr. Wessinger another question. Do you know what the balance due on that note is?

A. I believe it is—I think the note is \$4500, and I believe there are two payments of \$500 each.

Q. I wanted to ask you whether there was any other payment made that was not endorsed on the note?

A. No.

Q. Do these endorsements show the date the payments were made?

A. Yes. It is \$3500.00 plus whatever interest there may be.

(Witness excused.)

Mr. Teiser: Do you admit that that is the signature of Mr. Bauer?

Mr. McCurtain: Yes; there is no question about that.

Mr. Teiser: May I submit, there has been a demand made for the payment of this note?

Mr. McCurtain: Yes, we admit about the date of this letter there was a demand made.

Mr. Teiser: Prior to the date of this letter.

Mr. McCurtain: Sometime prior to April 19, 1916, through Mr. Silverstone, attorney, a demand was made upon the Thompson Estate Company for the payment of this note, and that the demand was refused; that he appeared at that time for the Weinhard Brewing Company, for the plaintiff.

Mr. Teiser: Now, I have a series of papers to offer in evidence, and I understand from counsel that they will be admitted as files from the court, without bringing the clerk or the referee to testify to them.

Mr. Bauer: We won't raise any question about that.

Mr. Teiser: I therefore introduce in evidence claim of R. R. Thompson Estate Company, filed with the referee in bankruptcy in the matter of I. Gevurtz & Sons, the original claim.

Mr. McCurtain: I make objection to the introduction of this evidence on the ground that the same is incompetent, irrelevant and immaterial and does not tend in any way to bind the Thompson Estate to the payment of this claim, and that there is nothing therein contained which is in writnig and signed by the Thompson Estate Company charging them with the payment of this claim; that there is no consideration for the making of such a promise, if there is anything which might be so construed.

Mr. Teiser: This claim is quite lengthy, your Honor, I will point out that portion which we claim is material. It is claimed, first item here, "I. Gevurtz &

Sons in account with the R. R. Thompson Estate Company," and then it is the item on one of the pages showing the amount of \$6000 due Henry Weinhard, and also the contract of indemnity, the note, the minutes of the meetings, and the option and other memoranda attached to said claim; and if your Honor will permit me to interrupt a second, I am now going to introduce the amended claim; that is, an amendment to that claim, or rather it is a substitution for that claim, which adopts by stipulation the exhibits in the claim, and in the amended claim it is set forth "Of all of said payments and also for the amount of this claim (that is the claim filed) which said R. R. Thompson Estate Co. advanced for said Multnomah Hotel Company and I. Gevurtz & Sons."

Which said proof of claim was marked Exhibit "D" and is in words and figures as follows, to-wit:

"IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT
OF OREGON.

In the Matter of I. Gevurtz & Sons, a corporation,
Bankrupt.

IN BANKRUPTCY.

At Portland, in said District of Oregon, on the 29th day of May A. D. 1913, came R. O. Yates, of Portland, in the County of Multnomah, and State of Oregon, and made oath and says that he is Secretary of The R. R. Thompson Estate Company, a corporation,

incorporated by and under the laws of the State of California, and carrying on business in the State of California, and at Portland, in the County of Multnomah, and State of Oregon, and that he is duly authorized to make this proof, and said that the said bankrupt, the corporation by whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said corporation in the sum of \$60,489.42; that the consideration of said debt is as follows: \$35,000.00 thereof and \$1050.00, interest thereon from January 1, 1913, on a promissory note dated January 16, 1913, payable on or before July 1, 1913, executed by I. Gevurtz & Sons in favor of The R. R. Thompson Estate Company, with interest at the rate of 6% per annum, copy of which is hereto attached, marked Exhibit "II" and upon which no payments have been made, and \$24,439.42, the balance due from said bankrupt to The R. R. Thompson Estate Co. under and by virtue of the terms of an agreement of sale by said bankrupt to The R. R. Thompson Estate Co. of all the common and preferred stock of the Multnomah Hotel Company, a corporation organized under the laws of the State of Oregon, free and clear of all liabilities, and a guaranty and indemnity by said I. Gevurtz & Sons to The R. R. Thompson Estate Co. against any and all indebtedness and liabilities of the Multnomah Hotel Company and against all claims or demands, actions, liabilities, suits, fines, liens and contracts of indebtedness of any character whatsoever, either due to I. Gevurtz & Sons directly or indirectly, or to any other

person, firm or corporation, arising out of or incurred in the operation of said Multnomah Hotel from the time of its beginning to the date of the delivery of possession of all of the common and preferred stock of Multnomah Hotel Company by I. Gevurtz & Sons to said The R. R. Thompson Estate Co., over and above the sum of \$210,000.00, being the aggregate amount of the purchase price of said common and preferred stock to-wit: \$175,000.00, and the amount of \$35,000.00 evidenced by the promissory note hereinabove referred to and marked Exhibit "H," and the guaranty of said bankrupt to pay any such indebtedness or liabilities which may remain unpaid or be in excess of the amount of \$210,000.00, less any and all credits on the note of \$35,000.00, to which said bankrupt might be entitled on account of the collection of any book accounts and bills receivable due Multnomah Hotel Company up to the 16th day of January, 1913, whenever the same have been collected, a copy of which said contract is hereto attached, marked Exhibit "G," a copy of which said contract of guaranty and indemnity is hereto attached, Exhibit "I," and a copy of the minutes of the special meeting of the board of directors of said bankrupt, ratifying the sale of said stock of Multnomah Hotel Company to said R. R. Thompson Estate Co. and authorizing the issue of the guaranty and indemnity aforesaid, marked Exhibit "J," a detailed statement of all claims, liabilities, and demands due and owing from the Multnomah Hotel Company and assumed and agreed to be paid by said bankrupt being hereto attached, marked Exhibits "A," "B," "C," "D," "E," and "F."

“That no part of said debt has been paid.

“That there are no set-offs or counterclaims to the same; that no judgment has ever been recovered thereon; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

“That in addition to the foregoing accounts and liabilities as exhibited and shown by the various exhibits hereinabove referred to, there appears on the original books of the Multnomah Hotel Company as kept by the old management, credits in favor of Philip Gevurtz, in the sum of \$4126.29, Alex Gevurtz, in the sum of \$1378.00, and Louis Gevurtz, in the sum of \$1378.00, in the aggregate a total of \$———. That the said Philip Gevurtz, Alex. Gevurtz and Louis Gevurtz have never claimed or demanded the said sums of money from either the Multnomah Hotel Company or the R. R. Thompson Estate Co. and from the nature of the accounts it might appear that they, or either of them may have a claim against I. Gevurtz & Sons therefor, but that each of said Philip Gevurtz, Alex Gevurtz and Louis Gevurtz are estopped from claiming or collecting said demands or accounts from The R. R. Thompson Estate Co., or the Multnomah Hotel Company, each of them having been directors of I. Gevurtz & Sons at the time of the adoption of the resolutions by I. Gevurtz & Sons ratifying the sale of said common and preferred stock of the Multnomah Hotel Company to The R. R. Thompson Estate Co. and authorizing the execution of the indemnity by said I. Gevurtz

& Sons hereinabove referred to, as Exhibits "G" and "I," and that the said Philip Gevurtz, Alex Gevurtz and Louis Gevurtz are estopped by their actions as directors of I. Gevurtz & Sons, and in accepting I. Gevurtz & Sons as liable for said claims, from collecting the same from The R. R. Thompson Estate Co. or the Multnomah Hotel Company. However, if the said Philip Gevurtz, Alex Gevurtz and Louis Gevurtz should establish said claims against the Multnomah Hotel Company or The R. R. Thompson Estate Co. this deponent will have the right to file its further claim against the above named bankrupts for the same.

(Sgd) R. O. YATES,
Secretary of said Corporation.

Subscribed and sworn to before me this 29th day of May, 1913.

CECIL H. BAUER,
Notary Public for Oregon."

(Verified May 29, 1913, by R. O. Yates, as Secretary of The R. R. Thompson Estate Company.)

Which said Amended Proof of Claim was marked Exhibit "E" and is in words and figures as follows, to-wit:

"In the District Court of the United States for the District of Oregon.

In the Matter of I. Gevurtz & Sons, a corporation, Bankrupt.	}	IN BANKRUPTCY
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"At Portland, in said District of Oregon, on the 26th day of November, A. D. 1913, came R. O. Yates, of Portland, in the County of Multnomah and State of

Oregon, and as and for an amended proof of claim, made oath and says that he is the Secretary of The R. R. Thompson Estate Company, a corporation, incorporated by and under the laws of the State of California, and carrying on business in the State of California, and at Portland, in the County of Multnomah and State of Oregon, and that he is duly authorized to make this proof, and says that the said bankrupt, the corporation by whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said corporation in the sum of \$60,489.42; that the consideration of said debt is as follows: \$35,000.00 thereof and \$1050.00, interest thereon from January 1, 1913, on a promissory note dated January 16, 1913, payable on or before July 1, 1913, executed by I. Gevurtz & Sons in favor of The R. R. Thompson Estate Company, with interest at the rate of 6% per annum, copy of which is hereto attached, marked Exhibit "H," and upon which no payments have been made, and \$24,439.42, the balance due from said bankrupt to The R. R. Thompson Estate Company under and by virtue of the terms of an agreement of sale by said bankrupt to The R. R. Thompson Estate Co. of all of the common and preferred stock of the Multnomah Hotel Company, a corporation organized under the laws of the State of Oregon, free and clear of all liabilities, and a guaranty and indemnity by said I. Gevurtz & Sons to The R. R. Thompson Estate Co. against any and all indebtedness and liabilities of the Multnomah Hotel Company and against all claims or

demands, actions, liabilities, suits, fines, liens and contracts of indebtedness of any character whatsoever, either due to I. Gevurtz & Sons directly or indirectly, or to any other person, firm or corporation, arising out of or incurred in the operation of said Multnomah Hotel from the time of its beginning to the date of the delivery of possession of all of the common and preferred stock of Multnomah Hotel Company by I. Gevurtz & Sons to said R. R. Thompson Estate Co., over and above the sum of \$210,000.00, being the aggregate amount of the purchase price of said common and preferred stock, to-wit: \$175,000.00, and the amount of \$35,000.00 evidenced by the promissory note hereinabove referred to and marked Exhibit "H," and the guaranty of said bankrupt to pay any of such indebtedness or liabilities which may remain unpaid or be in excess of the amount of \$210,000.00, less any and all credits on the note of \$35,000.00, to which said bankrupt might be entitled on account of the collection of any book accounts and bills receivable due Multnomah Hotel Company up to the 16th day of January, 1913, whenever the same have been collected, a copy of which said contract is hereto attached, marked Exhibit "C," a copy of which said contract of guaranty and indemnity is hereto attached, marked Exhibit "I," and a copy of the minutes of the special meeting of the board of directors of said bankrupt, ratifying the sale of said stock of Multnomah Hotel Company to said The R. R. Thompson Estate Co. and authorizing the issue of the guaranty and indemnity aforesaid, marked Exhibit "J," a detailed statement of all claims, liabilities, and

demands due and owing from the Multnomah Hotel Company and assumed and agreed to be paid by said bankrupt being hereto attached, marked Exhibits "A," "B," "C," "D," "E" and "F."

"That no part of said debt has been paid, except that an allowance has been made in the sum of \$2933.38, by stipulation made and entered into by and between The R. R. Thompson Estate Company and the Trustees of I. Gevurtz & Sons, Bankrupt, which is on file with the Referee in Bankruptcy, whereby the claim has been reduced to the sum of \$57,566.04.

"There are no set-offs or counterclaims to the same; that no judgment has ever been recovered thereon; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

"That in addition to the foregoing accounts and liabilities as exhibited and shown by the various exhibits hereinabove referred to, there appears on the original books of the Multnomah Hotel Company as kept by the old management credits in favor of Philip Gevurtz, in the sum of \$4126.29, Alex Gevurtz, in the sum of \$1378.00, and Louis Gevurtz, in the sum of \$1378.00, in the aggregate a total sum of \$———. That the said Philip Gevurtz, Alex Gevurtz and Louis Gevurtz have never claimed or demanded the said sums of money from either the Multnomah Hotel Company or The R. R. Thompson Estate Co. and from the nature of the accounts it might appear that they, or either of them may have a claim against I. Gevurtz & Sons

therefor, but that each of said Philip Gevurtz, Alex. Gevurtz and Louis Gevurtz are estopped from claiming or collecting said demands or accounts from The R. R. Thompson Estate Co. or the Multnomah Hotel Company, each of them having been directors of I. Gevurtz & Sons at the time of the adoption of the resolutions by I. Gevurtz & Sons ratifying the sale of said common and preferred stock of the Multnomah Hotel Company to The R. R. Thompson Estate Co. and authorizing the execution of the indemnity by said I. Gevurtz & Sons hereinabove referred to as Exhibits "G" and "I," and that the said Philip Gevurtz, Alex. Gevurtz and Louis Gevurtz are estopped by their actions as directors of I. Gevurtz & Sons, and in accepting I. Gevurtz & Sons as liable for said claims, from collecting the same from The R. R. Thompson Estate Co. or the Multnomah Hotel Company. However, if said Philip Gevurtz, Alex. Gevurtz and Louis Gevurtz should establish said claims against the Multnomah Hotel Company or The R. R. Thompson Estate Co. this deponent will have the right to file its further claim against the above named bankrupts for the same.

"And deponent further states that in truth and in fact the bankrupt is directly and primarily liable to The R. R. Thompson Estate Co. in the full sum hereinabove set out for the reason that the said Multnomah Hotel Company, while in form was a separate and independent corporation, in fact was a part and parcel of the business of the bankrupt; the said bankrupt acquired the lease on the property and completely furnished and equipped it during the year 1912, but for

the purpose of conducting the business and facilitating the manner of operating the said Multnomah Hotel Company, a corporation was formed in the year 1912, and I. Gevurtz & Sons, the Bankrupt, took and held all of the common stock of the corporation to-wit: 2000 shares, of the par value of \$100.00 per share, and 1450 shares out of the 1500 shares of the preferred stock. All of the directors and officers of the Multnomah Hotel Company were officers and directors of I. Gevurtz & Sons. And no separate account was kept of the Multnomah Hotel Company in the banks, but all of the money and proceeds of the operation of said hotel company were deposited in the First National Bank with the account of I. Gevurtz & Sons and mingled with it. That in order to furnish the hotel I. Gevurtz & Sons, bankrupt, was obliged to borrow large sums of money from the First National Bank of Portland, Oregon, and other banks, and to also pledge its credit to stock up the hotel with provisions and to meet the payroll of the business of the hotel. The money borrowed from the First National Bank for the use of the Multnomah Hotel Company was secured on notes signed by I. Gevurtz & Sons as makers, with the Multnomah Hotel Company. And stock of the Multnomah Hotel Company owned by I. Gevurtz & Sons was hypothecated as collateral security therefor. That the Multnomah Hotel Company had no assets or credit except such as had been furnished by I. Gevurtz & Sons.

“That the amount of the indebtedness of the Multnomah Hotel Company when The R. R. Thompson Estate Company purchased all of the common and pre-

ferred stock, amounting to about \$235,000.00, was practically guaranteed by I. Gevurtz & Sons, or secured by it and I. Gevurtz & Sons was liable on practically all of said indebtedness. That \$143,000.00 of the liabilities of Multnomah Hotel Company was on notes executed by I. Gevurtz & Sons and Multnomah Hotel Company to the First National Bank of Portland, Oregon, and from which I. Gevurtz & Sons was directly liable.

“That while the Multnomah Hotel Company operated the hotel as a separate entity, the Multnomah Hotel Company was merely a subsidiary corporation to I. Gevurtz & Sons and was incorporated only for the purpose of facilitating the conduct and management of the business and was in truth and in fact the agent for I. Gevurtz & Sons for whose benefit the hotel was operated and conducted, and I. Gevurtz & Sons was in truth and in fact liable and responsible for all of the indebtedness of the Hotel Company. That I. Gevurtz & Sons, bankrupt, in assuming the responsibility of The R. R. Thompson Estate Co. for the indebtedness of Multnomah Hotel Company, and in guaranteeing the same really and in truth and in fact did not increase its indebtedness or liability, as it was in fact already liable and responsible for all of said indebtedness. That all of the payments made by The R. R. Thompson Estate Company for the Multnomah Hotel Company stock were applied to the payment of indebtedness for which I. Gevurtz & Sons, the bankrupt, was liable, and said I. Gevurtz & Sons, bankrupt, obtained the benefit of all of said payments and also for the amount of this claim which said R. R.

Thompson Estate Co. advanced for said Multnomah Hotel Company and I Gevurtz & Sons.

“That if The R. R. Thompson Estate Co. had not purchased the Multnomah Hotel Company from I. Gevurtz & Sons the liabilities of I. Gevurtz & Sons would have been increased by the sum of at least two hundred and thirty or forty thousand dollars, while the assets would not have been increased for the reason that The R. R. Thompson Estate Co. had a first mortgage on all of the assets of the Multnomah Hotel Company, in the sum of \$75,000.00, as security for the lease executed by it to I. Gevurtz & Sons, and there would have been no equity left for the creditors of the Multnomah Hotel Company or I. Gevurtz & Sons.

R. O. YATES,

Secretary of said Corporation.

Subscribed and sworn to before me this 26th day of November, 1913.

CECIL H. BAUER.

Notary Public for Oregon.

(Verified by R. O. Yates, Secretary of R. R. Thompson Estate Co. November 26th, 1913.)

Which said Exhibit “E” is endorsed on the back as follows: No. 380. “Filed for \$60,489.42. Allowed after hearing for \$57,556.04. (Sgr) G. C. Murphy, Referee.

Stamped: “Filed November 11, 1913.

Attached to Exhibit “D” and by reference made a part of Exhibit “E” was an itemized statement of account, the first page of which is as follows:

I. GEVURTZ & SONS

—in account with—

THE R. R. THOMPSON ESTATE COMPANY

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LIABILITIES:

	Amnt. Due	Amnt. Paid	Bal. Due
Exhibit A—Accrued Wages.....	\$5,276.51	\$5,276.51	
B—Trade Accts. Payable.....	50,792.92	50,501.12	291.80
C—Sundry Accts. Payable.....	18,724.40	16,484.29	2240.11
D—Bills Payable & Interest.....	169,118.79	162,208.54	6910.25
	<hr/> \$243,912.62	<hr/> \$234,470.46	<hr/> \$9442.16

ASSETS:

Exhibit E—Sundry Accts. Receivable.....	3,148.58	1,247.43	1901.15
F—Guests Receivable.....	11,234.47	8,225.77	3008.70
	<hr/> 14,383.05	<hr/> 9,473.20	<hr/> 4909.85

Total liabilities of Multnomah Hotel Company at date of purchase by The R. R. Thompson Estate Company on Jan. 16, 1913, as per Exhibits A, B, C & D.....	\$243,912.62
Total collected on old assets since Jan. 16, 1913, as per Exhibits E & F.....	9,473.20
	<hr/>
	\$234,439.42

Purchase price paid for stock of Multnomah Hotel Company by the R. R. Thompson Estate Company in accordance with terms of option, a copy of which is attached hereto and marked "Exhibit G".....	175,000.00
Net amount owing The R. R. Thompson Estate Company by I. Gevurtz & Sons on account excess liabilities over \$175,000..	59,439.42
\$35,000.00 of which is covered by a note, copy of which is attached hereto and marked "Exhibit H" and the balance of \$24,439.42 is covered by their guarantee, copy of which is attached hereto and marked "Exhibit I." Interest on \$35,000 @ 6% Jan. 1, 1913, to July 1, 1913.....	1,050.00
	<hr/>

Total amount of claim.....\$ 60,489.42

Note—A copy of the proceedings of special meeting held on January 16, 1913, by I. Gevurtz & Sons, at which meeting the execution of Exhibits "G," "H" and "I" were authorized and ratified, is attached hereto and marked "Exhibit J."

Exhibit "A" attached to and forming a part of said itemized statement consists of an itemized statement of

moneys due to employees of Multnomah Hotel Company to January, 1913, and paid to them, aggregating the sum of \$5276.51, as shown on the summary of liabilities, "Exhibit A—Accrued Wages," heretofore set forth.

Exhibit "B" as aforesaid consisting of an itemized statement of trade accounts payable January 16, 1913, and payments made thereon by Multnomah Hotel Company since January 16, 1913, aggregating the sum of \$50,792.92 in amount, upon which payments are shown in the sum of \$50,501.12, and on which there remained unpaid a balance of \$291.80, as shown on summary of liabilities, "Exhibit B—Trade Accounts Payable," heretofore set forth.

Exhibit "C" as aforesaid consists of sundry accounts payable amounting to \$18,724.40 and payments made thereon by Multnomah Hotel Company since January, 1913, in the sum of \$16,484.29, and on which there remained unpaid a balance of \$2,240.11, as shown on summary of liabilities, "Exhibit C—Sundry Accts. Payable," heretofore set forth.

Exhibit "D" forming a part of said statement is in words and figures as follows, to-wit:

“EXHIBIT D”

BILLS PAYABLE

January 16, 1913.

1912		Amount	Interest	Paid	Check No.
May 8	First National Bank	50000			(Paid by note
13	“	43250			(of \$100,000
13	“	3600			(given First
13	“	5000		100000	(Nat'l Bank
13	“	5000			(by the R. R.
13	“	5000			(Thompson
13	“	5000			(Estate Co.
13	“	5000			
13	“	5000			

1913

Jan. 13

11000

\$142850.

\$420 90

43270 90

1

1912

Oct. 14 M. Seller & Co.
Int to Apr 14 '13

13821 67 418 52 2500 453
1740 19 866
10000 Notes given
by New Co.

1912

Feb. 3 Henry Weinhard Estate
Int @ 6% to May 13

1500 115

Mar. 6 Henry Weinhard Estate
Int @ 6% to May 13

4500 320 25

Dec. 5 Burley & Tyrell

500)
500) Interest
500) Waives
500)

2000 77

Dec. 5 National Cash Regis. Co.

1425 none

175 276
175 583
175 760
175 994

250 Credit A/c
Register
Ret'd

1912					
Oct. 26	Graves Music Co.	1080	4 80	1084 80	Paid by new cont.
1913					
Jan. 7	Marshall Wells Hdw. Co.	200	1 50	201 50	280
Jan. 7	"	200	2 80	202 80	579
Jan. 7	"	253 15	5 20	258 35	816
		<hr/>	<hr/>	<hr/>	<hr/>
		167829 82	1288 97	162208 54	
		1288 97		6910 25	
	Amounts Unpaid	<hr/>	<hr/>	<hr/>	<hr/>
		169118 79		169118 79	

ACCOUNTS UNPAID:	Amount	Interest
Henry Weinhard Estate	1500	115
“	4500	320 25
National Cash Reg.—bal.	475	
	<hr/> 6475	<hr/> 435 25
	435 25	
	<hr/> \$6910 25”	

Exhibit “E,” consisting of sundry accounts receivable, on which there was due January 16, 1913, \$3148.58 and on which there had been collected by the Thompson Estate Company \$1247.43, leaving balance due of \$1901.15.

Exhibit “F,” consisting of an itemized statement of accounts receivable from guests, together with credits thereon, upon which there was due the Hotel Company \$11,234.47, and on which collections are shown in the sum of \$8225.77, leaving unpaid \$3008.70.

Exhibit “G” attached to said itemized statement as aforesaid is in words and figures as follows, to-wit:

EXHIBIT “G”

“FOR AND IN CONSIDERATION OF \$1.00 to it in hand paid by THE R. R. THOMPSON ESTATE COMPANY, a corporation organized and existing under the laws of the State of California, receipt of which is hereby acknowledged, I. GEVURTZ & SONS, a corporation organized under the laws of the State of Oregon, the owner of all of the common capital stock of MULTNOMAH HOTEL COMPANY,

a corporation organized under the laws of the State of Oregon, DOES HEREBY GIVE AND GRANT unto 'The R. R. Thompson Estate Company the sole and exclusive right, privilege and option for the period of fifteen days from this date to purchase all of the common and preferred stock of said Multnomah Hotel Company now issued, outstanding, subscribed for or contracted to be sold, for the sum of \$175,000.00, Gold Coin of the United States of America, to be paid for in cash, if this said option shall be exercised, upon delivery of said stock to 'The R. R. Thompson Estate Company, or to whomever it may authorize the same to be transferred; the said I. Gevurtz & Sons to show proper authorization by resolution of its Board of Directors for such purpose.

“The R. R. Thompson Estate Company shall have the right in paying said \$175,000.00, in consideration for said stock, to apply the same towards the payment of the indebtedness of said Multnomah Hotel Company to the First National Bank of Portland, Oregon, and to all other creditors of said company to the extent of said sum of \$175,000.00, and any and all other liabilities or indebtedness of said Multnomah Hotel Company up to the date of the transfer of stock shall be paid, satisfied and discharged by I. Gevurtz & Sons, provided, however, that if said I. Gevurtz & Sons shall not be in position to pay the same immediately, as the same becomes due, the R. R. Thompson Estate Company will advance necessary moneys to pay and discharge the same for said I. Gevurtz & Sons upon the execution of its promissory note to the R. R. Thompson Estate Company for

all said sums of money so required, with interest at the rate of 6%, payable six months from the first day of January, 1913, provided, however, that said amounts in the aggregate shall not exceed the sum of \$35,000.00, and provided, further, that all sums of money received by the Multnomah Hotel Company after said The R. R. Thompson Estate Company shall take possession thereof, realized from the payment of the outstanding book accounts and bills and accounts receivable due up to the first day of January, 1913, shall be applied by the R. R. Thompson Estate Company towards the payment of the amounts advanced by it to I. Gevurtz & Sons on its promissory note aforesaid.

“The said I. Gevurtz & Sons SHALL FURTHER WARRANT AND GUARANTEE said The R. R. Thompson Estate Company against any and all indebtedness and liabilities of said Multnomah Hotel Company over and above the aggregate amounts of \$175,000.00, consideration of the purchase price of the stock, and \$35,000.00, to be advanced by it in payment and liquidation of the obligations of said Hotel in excess of the purchase price of the stock, and SHALL INDEMNIFY The R. R. Thompson Estate Company against all further claims or demands, actions, damages, liabilities, suits, fines, liens, contracts or indebtedness of any character whatsoever, either due to I. Gevurtz & Sons, directly or indirectly, or to any other person, firm or corporation arising out of and incurred in the operation of said Multnomah Hotel, from the time of its beginning to the date of delivery of possession.

“It being the intention that in selling all of the com-

mon and preferred stock of the corporation to said The R. R. Thompson Estate Company for the sum of \$175,000.00, as aforesaid, the said Thompson Estate Company shall thereby obtain good title to all of the property and assets of said Multnomah Hotel Company, free and clear of all claims, demands, liabilities, liens, or indebtedness of any character or nature whatsoever, and that any and all other such debts, liabilities, liens or indebtedness shall be assumed and paid by said I. Gevurtz & Sons, and the advance by The R. R. Thompson Estate Company of the additional sum of \$35,000.00 shall only be as a matter of accommodation to I. Gevurtz & Sons, and shall not be any acknowledgment of any assumption by said Thompson Estate Company of any further liabilities, or for the payment of any greater sum for the assets of the Multnomah Hotel Company than represented by the purchase price of the common and preferred stock.

“IT BEING FURTHER UNDERSTOOD AND AGREED that the rental due from Multnomah Hotel Company to The R. R. Thompson Estate Company for the month of December, 1912, shall be considered as an obligation and indebtedness of the Hotel Company, and shall be deducted from the payment of the purchase price of the stock, AND FURTHER that the rental becoming due on the first day of January, 1913, shall be assumed and paid by the Multnomah Hotel Company to The R. R. Thompson Estate Company after the new management shall take possession.

“IN WITNESS WHEREOF, I. Gevurtz & Sons have caused this instrument to be executed by its presi-

dent, and its corporate seal affixed by authority of its Board of Directors, on the 10th day of January, 1913.

I. GEVURTZ & SONS (Seal)

By (Sgd) Philip Gevurtz

President

Witnessed by:

(Sgd) Cecil H. Bauer

(Sgd) J. L. Potts

Exhibit "H" attached to said itemized statement as aforesaid is in words and figures as follows, to-wit:

"EXHIBIT H"

\$35,000.00 Portland, Oregon, January 16, 1913.

On or before July 1, 1913, after date, without grace, I. GEVURTZ & SONS promises to pay to the order of THE R. R. THOMPSON ESTATE COMPANY, at Portland, Oregon, THIRTY-FIVE THOUSAND DOLLARS, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin at the rate of six per cent per annum from date until paid. Interest to be paid at maturity. And in case suit or action is instituted to collect this note, or any portion thereof, I. Gevurtz & Sons promises and agrees to pay, in addition to the costs and disbursements provided by statute, such additional sum, in like Gold Coin, as the Court may adjudge reasonable, for attorney's fees to be allowed in said suit or action.

I. GEVURTZ & SONS (Seal)

By (Sgd) Philip Gevurtz

President

I. GEVURTZ & SONS

By (Sgd) Louis Gevurtz

Secretary"

Exhibit "I" attached to said itemized statement as aforesaid is in words and figures as follows, to-wit:

"EXHIBIT I"

I. GEVURTZ & SONS, a corporation, by Philip Gevurtz, president, and Louis Gevurtz, secretary, being thereunto duly authorized by and in pursuance of a resolution of the Board of Directors of said company, duly adopted at a special meeting of said Board of Directors held on the 16th day of January, A. D. 1913, and in consideration of One Dollar in hand paid, and other good considerations received from THE R. R. THOMPSON ESTATE COMPANY, a corporation, receipt whereof is hereby acknowledged, DOES HEREBY AGREE, and by these presents guarantees unto The R. R. Thompson Estate Company, and its successors or assigns, that it will indemnify and save the said R. R. Thompson Estate Company, and its successors and assigns, free and harmless against any and all indebtedness and liabilities of the MULTNOMAH HOTEL COMPANY, a corporation, and against all claims or demands, actions, damages, liabilities, suits, fines, liens and contracts of indebtedness of any character whatsoever, either due to I. Gevurtz & Sons, directly or indirectly, or to any other person, firm or corporation arising out of or incurred in the operation of said Multnomah Hotel Company from the time of its beginning

to the date of delivery of possession of all of the common and preferred stock of said Multnomah Hotel Company by I. Gevurtz & Sons to The R. R. Thompson Estate Company, over and above the sum of \$210,000.00, being the aggregate amount of the purchase price of the said common and preferred stock, TO-WIT: \$175,000.00 and the amount of \$35,000.00 this day loaned and advanced to I. Gevurtz & Sons, all of which said \$210,000.00 is to be applied upon and paid in liquidation of the debts and obligations of said Hotel Company, it having been agreed under and by virtue of the terms of that certain option given by I. Gevurtz & Sons to The R. R. Thompson Estate Company for the sale of all of the common and preferred stock of the Hotel Company, and IN CONSIDERATION THEREOF, that I. Gevurtz & Sons shall so indemnify and save the said R. R. Thompson Estate Company and its successors and assigns from the against all of such claims, demands, indebtedness, liabilities, actions, damages, suits, fines, liens and contracts of indebtedness of any character whatsoever. And the said I. Gevurtz & Sons by these presents binds itself to pay any of such indebtedness or liabilities which may remain unpaid, or be in excess of the amount of \$210,000.00, to be applied as hereinbefore provided, less any and all credits on the note of \$35,000.00, to which the said I. Gevurtz & Sons may be entitled on account of collection of any book accounts or accounts and bills receivable due to the Hotel Company up to this date, whenever the same have been collected, but that if the same, or any part thereof, is uncollectible, or the payment thereof is delayed to any unrea-

sonable time, the same shall not be considered as postponing the liability of I. Gevurtz & Sons upon its guaranty for any excess of indebtedness presented and required to be paid by the Multnomah Hotel Company.

“IT BEING AGREED AND UNDERSTOOD that the R. R. Thompson Estate Company, transferees and assignees of the common and preferred stock of the Multnomah Hotel Company, shall assume the contract made and entered into by and between the Multnomah Hotel Company and H. C. Bowers, as manager, and all other legal and valid contracts of employment, but that I. Gevurtz & Sons shall not be liable under any contract for the purchase of automobile busses, and further shall not be liable for the rental due to The R. R. Thompson Estate Company for the month of January, 1913.

Dated this 16th day of January, A. D. 1913.

I. GEVURTZ & SONS

By (Sgd) Philip Gevurtz

President

I. GEVURTZ & SONS

By (Sgd) Louis Gevurtz

President”

Exhibit “J” attached to said itemized statement as aforesaid is in words and figures as follows, to-wit:

"EXHIBIT J"

SPECIAL MEETING OF THE BOARD OF
DIRECTORS OF I. GEVURTZ & SONS.

"A special meeting of the Board of Directors of I. GEVURTZ & SONS having been duly called by the president by notice in writing, to all of said directors as provided in the by-laws, for the purpose of considering the sale and transfer of all of the common and preferred stock of Multnomah Hotel Company to The R. R. Thompson Estate Company, a corporation, and to guarantee to the said Estate Company against all claims or demands, liabilities, or indebtedness of the said Hotel Company beyond the amount of the purchase price of the stock, and for the execution of a note of the corporation to The Estate Company for moneys to be advanced by it to pay the balance of the indebtedness of the Hotel Company, the following directors, TO-WIT: Philip Gevurtz, Alex Gevurtz, Matthew Gevurtz and Louis Gevurtz, being present in person, and the remaining director, I. Gevurtz, being absent from the city, and having waived notice of the meeting in writing, and consented to the same, and having ratified all of the actions taken at said meeting, the said meeting was held at the office of the company on the 16th day of January, 1913, at the hour of two o'clock P. M., the time appointed in the notice for the said meeting.

"Philip Gevurtz, president, presided at the meeting, and Louis Gevurtz, secretary, acted as such. The following proceedings were had:

"Philip Gevurtz offered the following resolution,

which having been duly seconded by Louis Gevurtz, after discussion, was unanimously adopted:

“WHEREAS this company is the owner and holder of all of the common stock of Multnomah Hotel Company, a corporation organized and existing under the laws of the State of Oregon, TO-WIT: 2000 shares of the par value of \$100.00 per share, 8 shares of which are now in the individual names of I. Gevurtz, C. Gevurtz, Philip Gevurtz, Lillie Gevurtz, Alex Gevurtz, Matthew Gevurtz, S. Misch and Louis Gevurtz, for the purpose of maintaining the corporate existence of the Multnomah Hotel Company, but in truth and in fact the said stock is owned by I. Gevurtz & Sons, and the said I. Gevurtz & Sons is also the owner and holder of 1450 shares of the preferred stock of the said Multnomah Hotel Company, and W. J. Van Schuyver & Co. is the owner of 50 shares, all of the par value of \$100.00 per share, and the said 2000 shares of the common stock is all of the common stock authorized and issued by the Multnomah Hotel Company, and which said 1500 shares of the preferred stock is all of the preferred stock authorized and issued by said Multnomah Hotel Company, and there is no further unissued, common or preferred stock, nor any treasury stock of said Multnomah Hotel Company, AND

“WHEREAS, all of the said stock, both common and preferred, has been fully paid for, and there is no liability of any of the stockholders for any unpaid portion thereof, and the same is fully and adequately paid up and non-assessable, AND

“WHEREAS, the said Multnomah Hotel Com-

pany is indebted to divers and various banks, corporations, firms and individuals in the sum of about \$———, and on account of lack of capital and business conditions now existing in the City of Portland, and the necessity of I. Gevurtz & Sons for further capital to operate its own business, and it is unable to obtain any further money or credit for either the Hotel Company or its own business, and will require a large amount of money immediately to liquidate its liabilities, which it is unable to obtain, and in the judgment of the directors of I. Gevurtz & Sons it is absolutely necessary to sell and dispose of all of the stock owned by it in said Multnomah Hotel Company in order to obtain money to liquidate its liabilities and to continue its own business, AND

“WHEREAS, The R. R. Thompson Estate Company, a corporation, has offered to purchase the said stock of the Multnomah Hotel Company and to take over the said business, and in pursuance thereof I. Gevurtz & Sons, by its president and secretary, did, on the 10th day of January, 1913, make, execute and deliver under the seal of this corporation, to said R. R. Thompson Estate Company an option for the period of fifteen days from said date for the purchase of all of the common and preferred stock of said Multnomah Hotel Company now issued, outstanding, subscribed for or contracted to be sold, for the sum of \$175,000.00, Gold Coin of the United States of America, to be paid for in cash, upon delivery of said stock to The R. R. Thompson Estate Company, or to whomsoever it might authorize the same to be transferred, if said Es-

tate Company should exercise its said option, all of the terms and conditions for said sale being fully set out and contained in said option, and the said The R. R. Thompson Estate Company has notified this company that it has exercised its right to so purchase all of the common and preferred stock of the Multnomah Hotel Company on the terms and conditions in said option fully set out and contained, and is ready and willing to pay over the said sum of \$175,000.00, and to accept the delivery of all of the common and preferred stock of said Multnomah Hotel Company, AND

“WHEREAS, this company has endeavored to sell the assets of the Multnomah Hotel Company, or the common and preferred stock, to other parties; and the offer of The R. R. Thompson Estate Company is the best offer the directors have been able to obtain, and in the judgment of the directors, under the conditions and the emergencies existing, it is to the advantage and for the best interests of this corporation that the offer of said R. R. Thompson Estate Company be accepted, NOW THEREFORE BE IT

“RESOLVED: That the directors of I. Gevurtz & Sons HEREBY RATIFY AND CONFIRM the action of the president and secretary in making and executing, on behalf of this corporation, its option to The R. R. Thompson Estate Company, AND BE IT FURTHER

“RESOLVED: That I. Gevurtz & Sons do, AND IT IS HEREBY authorized and directed to sell to the said R. R. Thompson Estate Company all of the common stock of the Multnomah Hotel Company

owned by it, to-wit: 2000 shares, of the par value of \$100.00 per share, and all of the preferred stock of said Multnomah Hotel Company owned by it TO-WIT: 1450 shares, of the par value of \$100.00 per share, and to obtain and procure the 50 shares of the preferred stock now owned and held by W. J. Van Schuyver & Co. and to sell same to The R. R. Thompson Estate Company, together with its own stock, being in all the total amount of common and preferred stock authorized and issued, the same being fully paid up and non-assessable, and that the president and secretary of this company be, and they are hereby authorized and directed to endorse all of the common and preferred stock owned and held by it, and to procure the proper endorsement by the other individual members and stockholders of the corporation of I. Gevurtz & Sons now holding each one share of the capital stock, and also to obtain the assignment and transfer of the 50 shares of the preferred stock held by W. J. Van Schuyver & Co., and to deliver all of said stock, TO-WIT: 2000 shares of the common stock, and 1500 shares of the preferred stock, to the said R. R. Thompson Estate Company forthwith, upon the payment of this company of the consideration therefor, TO-WIT: \$175,000.00, AND

“WHEREAS, one of the conditions of the sale of the said stock to the said The R. R. Thompson Estate Company was that I. Gevurtz & Sons should pay all liabilities or indebtedness of said Multnomah Hotel Company up to the date of the transfer of the stock, and shall satisfy and discharge the same, and that if

said I. Gevurtz & Sons should not be in position to pay the same immediately, as the same becomes due, The R. R. Thompson Estate Company would advance the necessary moneys to pay and discharge the same for said I. Gevurtz & Sons upon the execution of its promissory notes to The R. R. Thompson Estate Company for all such sums of money so required, with interest at the rate of 6% per annum, payable six months from the first day of January, 1913, provided, however, that said amount in the aggregate should not exceed the sum of \$35,000.00. AND PROVIDED FURTHER, that all sums of money received by Multnomah Hotel Company after said The R. R. Thompson Estate Company should take possession thereof realized from the outstanding book accounts and bills and accounts receivable due up to the first day of January, 1913, should be applied when, and only if collected by The Thompson Estate Company, towards the payment of the amounts advanced by it to I. Gevurtz & Sons on its promissory note aforesaid, AND FURTHER, that the said I. Gevurtz & Sons should warrant and guarantee said The R. R. Thompson Estate Company against any and all indebtedness and liabilities of said Multnomah Hotel Company over and above the aggregate amounts of \$175,000.00 consideration of the purchase price of the stock, and \$35,000.00 to be advanced by said R. R. Thompson Estate Company to it in payment and liquidation of the obligations of said Multnomah Hotel Company in excess of the purchase price of the stock, and should indemnify the said R. R. Thompson Estate Company against all further claims

or demands, actions, damages, liabilities, suits, fines, liens, contracts or indebtedness of any character whatever, either due to I. Gevurtz & Sons directly or indirectly, or to any other person, firm or corporation arising out of or incurred in the operation of said Multnomah Hotel Company from the time of its beginning to the date of delivery of possession thereof to said The R. R. Thompson Estate Company, it having been the intention that in selling all of said common and preferred stock to said R. R. Thompson Estate Company should thereby obtain good title to all of the property and assets of said Multnomah Hotel Company, free and clear of all claims, demands, liabilities, liens or indebtedness of any character or nature whatsoever, and that any and all other such demands, liabilities, liens or indebtedness should be assumed and paid by I. Gevurtz & Sons, and that the advance to said I. Gevurtz & Sons of the additional sum of \$35,000.00 upon its promissory note, should only be considered as a matter of accommodation, and not any acknowledgment of any assumption by said R. R. Thompson Estate Company of any further liability or for the payment of any greater sum for the assets of the Multnomah Hotel Company than represented by the purchase price of the common and preferred stock, NOW THEREFORE BE IT FURTHER

“RESOLVED: That the president and secretary of this company be, and they are hereby authorized and directed to make, execute and deliver to The R. R. Thompson Estate Company its promissory note for the sum of \$35,000.00, with interest at the rate of six per

cent per annum, payable six months from the first day of January, 1913, AND FURTHER

“That out of the sums of \$175,000.00 paid by The R. R. Thompson Estate Company for the said common and preferred stock, and the sum of \$35,000.00, advanced to said I. Gevurtz & Sons upon the said promissory note, the said R. R. Thompson Estate Company shall pay the whole thereof to the various creditors of said Multnomah Hotel Company as far as the same will satisfy the indebtedness, and that the President and Secretary be, and they are hereby authorized and directed, on behalf of this corporation to make and execute such guaranty and indemnification as the said R. R. Thompson Estate Company may require and demand, protecting it against all further claims or demands, actions, damages, liabilities, suits, fines, liens, contracts or indebtedness of any character whatsoever, either due to I. Gevurtz & Sons directly or indirectly, or to any other firm or corporation, arising out of or incurred in the operation of said Multnomah Hotel from the time of its beginning to the date of delivery of possession to the R. R. Thompson Estate Company, over and above the aggregate sum of \$210,000.00 to be paid out and applied by said R. R. Thompson Estate Company upon the indebtedness of said Hotel Company aforesaid. AND BE IT FURTHER

“RESOLVED: That the rental due from Multnomah Hotel Company to The R. R. Thompson Estate Company for the month of December, 1912, shall be, and is hereby declared to be one of the liabilities which is to be paid out of the proceeds of the purchase

price of the stock, and that the rental for the month of January, 1913, shall be assumed by the R. R. Thompson Estate Company and not considered as an obligation or indebtedness of the Multnomah Hotel Company, **AND FURTHER**, that any and all indebtedness and liability incurred by the Hotel Company since the first day of January, 1913, up to the date of the delivery of possession of said stock to the R. R. Thompson Estate Company over and above the income from said hotel, paid and applied thereon, and after applying all collections, when and if made, of the outstanding book accounts and accounts and bills receivable from the first day of January, 1913, shall be considered as a liability to be assumed and paid by I. Gevurtz & Sons, and included in the guaranty to be given to The R. R. Thompson Estate Company, as hereinbefore provided. **AND BE IT FURTHER**

“RESOLVED: That the said option in writing shall be and it is hereby adopted as a binding and valid contract between The R. R. Thompson Estate Company and I Gevurtz & Sons, upon the payment of the purchase price, **TO-WIT:** \$175,000.00 by said R. R. Thompson Estate Company, and shall have the same force and effect as a contract duly entered into between the parties thereto, pertaining and relating to all matters therein contained. **AND BE IT FURTHER**

“RESOLVED: That a copy of the minutes of this meeting duly certified by the secretary of this company, be furnished to The R. R. Thompson Estate Company.

"There being no further business on motion, the meeting adjourned.

(Signed) Philip Gevurtz
President

(Signed) Louis Gevurtz
Secretary."

**"STATE OF OREGON
COUNTY OF MULTNOMAH—ss.**

I, Louis Gevurtz, the duly elected, qualified and acting secretary of I. GEVURTZ & SONS, a corporation, HEREBY CERTIFY that the foregoing is a full, true and complete copy of the minutes of a special meeting of the Board of Directors of I. Gevurtz & Sons held at the office of the Company on the 16th day of January A. D. 1913, and of the whole thereof.

(Signed) LOUIS GEVURTZ
Sec'y

(SEAL) I. Gevurtz & Sons"
"Louis Gevurtz, Secretary,

I. GEVURTZ & SONS
Multnomah Hotel,
Portland, Oregon.

I HEREBY ACKNOWLEDGE receipt of notice of special meeting of the directors of I. GEVURTZ & SONS to be held January 16th, nineteen hundred and thirteen at two PM and consent thereto and hereby ratify and all action taken at said meeting.

I. GEVURTZ."

STATE OF OREGON
COUNTY OF MULTNOMAH—ss.

I, Louis Gevurtz, Secretary of I. Gevurtz & Sons a corporation, hereby certify that the foregoing is a full, true and complete copy of telegram received by me as secretary of said I. GEVURTZ & SONS, from I. Gevurtz, on the 15th day of January, 1913, and the whole thereof.

(Signed) Louis Gevurtz

(SEAL)

Sec'y

I. Gevurtz & Sons

COURT: There is \$1500 here besides that \$4500.

Mr. Teiser: Yes. That has been paid since that time. \$2000 has been paid since that time. There were two notes. The \$1500 note has been paid, and \$1000 of the \$4500 note has been paid.

COURT: You are only relying on the one note?

Mr. Teiser: Oh, absolutely. We are only suing on the \$3500.

COURT: What is the object of amending it?

Mr. Teiser: There was filed, after that claim was allowed, in fact after decision of the referee, an amended claim in bankruptcy by the R. R. Thompson Estate Company in the I. Gevurtz & Sons matter. The amended claim was filed by stipulation. I shall also introduce the stipulation between the attorney for the trustee and the attorney for the R. R. Thompson Estate Company. The amended claim adopts all of the exhibits filed in the original claim as though they were filed and attached thereto. The amended claim contains many additional allegations, among them the al-

legation that all of the payments made by the R. R. Thompson Estate Company for the Multnomah Hotel Company stock were applied to the payment of indebtedness for which I Gevurtz & Sons, the bankrupt, were liable, and said I Gevurtz & Sons obtained the benefit of all of said payments, etc.

Mr. McCurtain: I want to save an exception on the original objection, if your Honor please, that there is no privity between I. Gevurtz & Sons and the Thompson Estate Company or the Multnomah Hotel Company and the plaintiffs in this case; that the claim for whatever it is worth could not in any way bind the Thompson Estate Company to the indebtedness of the Weinhard Brewery, because of the fact that the Weinhard Brewery were not parties to this bankruptcy proceeding or to the claim or its allowance or rejection.

COURT: Very well. The objection is overruled and your exception allowed.

Mr. McCurtain: I assume, your Honor, in all these objections, exception is allowed unless your Honor so states?

COURT: Yes.

Which said Stipulation was marked Exhibit "F" and is in words and figures as follows, to-wit:

"In the District Court of the United States for the
District of Oregon

In the Matter of I. Gevurtz)	
& Sons, a corporation,)	IN BANKRUPTCY
Bankrupt)	

"It is hereby stipulated by and between Reed & Bell, attorneys for the trustees of I. Gevurtz & Sons,

bankrupt, and Bauer & Greene and A. H. McCurtain, attorneys for The R. R. Thompson Estate Co. that an amended proof of claim of said R. R. Thompson Estate Co. against I. Gevurtz & Sons, bankrupt, for the sum of \$57,566.04 may be filed with the Referee in Bankruptcy in the above entitled matter as a general claim, and that the order of the Referee allowing the claim of said The R. R. Thompson Estate Co., dated the 11th day of November, 1913, shall apply to the proof of claim as amended as though said amended proof of claim had been the original proof of claim. And that the exhibits attached to the original proof of claim, and referred to in the amended proof of claim be considered as attached to the amended proof of claim and made a part thereof.

REED & BELL

Attorneys for the Trustees of I. Gevurtz & Sons, bankrupt.

BAUER & GREENE and A. H. McCURTAIN

Attorneys for The R. R. Thompson Estate Co.

Mr. Teiser: I shall now offer in evidence, your Honor, and ask to be introduced memorandum of authorities and brief of R. R. Thompson Estate Company in support of its claim in the bankruptcy proceedings. It is the brief of attorneys for the R. R. Thompson Estate Company.

Same objection.

Which said Memorandum of Authorities was marked Exhibit "G" and is in words and figures as follows:

“IN THE MATTER OF I. GEVURTZ & SONS
Bankrupt

BRIEF OF ATTORNEYS FOR THE R. R.
THOMPSON ESTATE COMPANY

“For the past several years of the existence of I. Gevurtz & Sons it was engaged to a great extent in taking leases on buildings for hotel and lodging house purposes, furnishing the same and operating them until they could make an advantageous sale of them. In most cases they incorporated subsidiary companies to operate such hotel or lodging house. While the corporations were apparently separate and distinct from the parent corporation I. Gevurtz & Sons, in fact I. Gevurtz & Sons owned all of the stock of each of the said corporations and really owned the entire assets of each corporation, simply using the corporate form as a matter of convenience and safety. This feature of its business became so extensive and so many questions arose in the sale of the various subsidiary corporations by the transfer of the stock and as to the protection of purchasers of the stock against liabilities of the subsidiary corporations, which I. Gevurtz & Sons were called upon to guarantee and indemnify the purchasers against, that the question arose as to whether they had the authority to do so under their articles of incorporation. Accordingly at the annual meeting of I. Gevurtz & Sons, held in January, 1912, the articles of incorporation were amended as follows: “To purchase, own, sell, and deal in shares of stock, bonds, debentures and obligations of public and other private corpora-

tions, and to guarantee said stocks, bonds, debentures and obligations of other corporations." The sole and only purpose of this amendment was to authorize and protect I. Gevurtz & Sons in dealing with the stock of subsidiary corporations and selling the same, to guarantee the purchasers and indemnify them against claims of indebtedness that might be outstanding against the corporations.

"During the year 1912 I. Gevurtz & Sons, having acquired the lease on the Multnomah Hotel, and having completely furnished and equipped it, took in payment thereof all of the common stock of the corporation, to-wit: \$200,000.00 of the par value of \$100.00 per share, and 1450 shares out of the 1500 shares of the preferred stock of said company, of the par value of \$100.00, W. J. VanSchuyver & Co. having been issued the other 50 shares of preferred stock in payment of merchandise. In order to furnish the hotel I. Gevurtz & Sons were obliged to purchase all of the Furniture and equipments in its own name and pay for same, and in order to do so borrowed large sums of money from the First National Bank of Portland, Oregon, and other banks. In addition to this it required a large sum of money and credit to stock up the hotel with provisions and also to meet the pay roll until the business of the hotel was on a sound footing. Owing to local conditions and the great expense of fitting up the hotel and getting it started properly I. Gevurtz & Sons were drained of all money and resources for its own business, and could not borrow any more money from the First National Bank or any other institution. In the meanwhile I. Gevurtz & Sons

had contracted for a lease on the 12-story building at Fifth and Alder Street, Portland, Oregon, and required a large amount of money to fit up the same and procure stock with which to operate its business therein. It could neither obtain the stock of merchandise necessary, nor money, on account of the heavy drain upon it caused by the Multnomah Hotel, and found itself in the position where it would have to either abandon the hotel and sacrifice all the money it had invested in it, or suspend its own business. It immediately set about to find a purchaser for the Multnomah Hotel, but found it impossible to sell it at all. At this time it was several months in arrears in its rent to The R. R. Thompson Estate Co., and as a last resort appealed to the Thompson Estate Co. to buy the hotel under a threat that unless it did so they would be compelled to suspend the operation of the hotel and leave the building on the hands of the Thompson Estate Co.

“R. O. Yates, the manager and secretary of the Thompson Estate Co., came to Portland and investigated conditions and finally took an option from I. Gevurtz & Sons on or about the 1st day of January, 1913, upon the purchase of all of the common and preferred stock of the Multnomah Hotel Co. for \$175,000.00. This was by far the best offer received by I. Gevurtz & Sons for the sale of the hotel. The exigencies of I. Gevurtz & Sons and the fact that this was the best offer is set out in the recitals of the records of the special meeting of the directors of I. Gevurtz & Sons, Exhibit J of the proof of claim of The R. R. Thompson Estate Co. vs. I. Gevurtz & Sons, and is as follows:

“Whereas, the said Multnomah Hotel Company is indebted to divers and various persons, corporations, firms and individuals in the sum of about \$. and on account of the lack of capital, and business conditions now existing in the City of Portland, and the necessity of I. Gevurtz & Sons for further capital to operate its own business, and it is unable to obtain any further money or credit either for Multnomah Hotel Company or its own business, it will require a large amount of money immediately to liquidate its liabilities, which it is unable to obtain, and in the judgment of the directors of I. Gevurtz & Sons it is absolutely necessary to sell and dispose of all of the stock owned by it in said Multnomah Hotel Company, in order to obtain money to liquidate its liabilities, and to continue its own business. * * *

“Whereas, this company has endeavored to sell the assets of the Multnomah Hotel Company, or the common and preferred stock to other parties, and the offer of The R. R. Thompson Estate Co. is the best offer the directors have been able to obtain, and in the judgment of the directors, under the conditions and the emergencies existing, it is to the advantage and to the best interests of this corporation that the offer of said R. R. Thompson Estate Co. shall be accepted, now therefore * * *

“It must be borne in mind that both I. Gevurtz & Sons and Multnomah Hotel Company were doing their banking business with the First National Bank, but the Multnomah Hotel Company kept no separate account in the First National Bank and all of the accounts and deposits were kept under the name of I. Gevurtz & Sons, each concern drawing as it needed

money and "robbing Peter to pay Paul." If I. Gevurtz needed money they took it from the Multnomah Hotel Company and vice versa. And the fact that the Multnomah Hotel Company was constantly running behind in its operating expenses, to say nothing of failure even to pay interest on the notes to the First National Bank, and the business of I. Gevurtz & Sons being practically suspended on account of moving into its new location, both the Hotel Company and I. Gevurtz & Sons were in desperate straits for ready money. If this sale had not been made both the Hotel Company and I. Gevurtz & Sons would have suspended and gone into bankruptcy in January, 1913.

"One of the conditions of the purchase of stock by The R. R. Thompson Estate Co. from the Multnomah Hotel Company was that I. Gevurtz & Sons should guarantee and indemnify the Thompson Estate Co. against all liabilities and indebtedness of the Multnomah Hotel Company. From an examination made of the books by Mr. Yates and his expert, owing to the confused condition of the books, they estimated as nearly as possible, that the liabilities amounted to about \$210,000.00. Of this amount \$143,000.00 was due to the First National Bank on joint notes signed by Multnomah Hotel Company and I. Gevurtz & Sons. As a matter of fact none of the money borrowed from the bank, for which these notes were given went into the Multnomah Hotel Company, except possibly the sum of \$11,000.00, borrowed on the 11th day of May, 1913. This money was borrowed by I. Gevurtz & Sons to pay for the furniture and equipments they put into the hotel,

and for which they took the whole issue of common and preferred stock of the Hotel Company. I. Gevurtz & Sons, however, were required by the bank to not only sign the note themselves but obtain the signature of Multnomah Hotel Company, and bring all of the stock of the Multnomah Hotel Company as surety. The note given to the bank was a direct obligation of I. Gevurtz & Sons and one for which the Multnomah Hotel Company was not liable, except that indirectly it obtained the benefit of it, but had paid fully for it by the issue of the capital stock to I. Gevurtz & Sons.

"The other indebtedness was due to various and sundry firms and corporations.

"The R. R. Thompson Estate Co. paid over the sum of \$175,000.00 to I. Gevurtz & Sons by taking up the notes above mentioned, at the First National Bank, and paying other creditors. It also paid out the sum of \$35,000.00, the balance of the amount of indebtedness shown on the books of the Multnomah Hotel Company, as a matter of accommodation, and took the note of I. Gevurtz & Sons for same, payable six months after date. I. Gevurtz & Sons then guaranteed any further liabilities by the guarantee dated January 16, 1913, marked Exhibit I, attached to the proof of claim of The R. R. Thompson Estate Co. vs. I. Gevurtz & Sons.

"After a full audit of the books, and receipt of all claims of indebtedness against the Multnomah Hotel Company it developed that instead of being \$35,000.00, as evidenced by the note, it was about \$60,000.00, and it is for the payment of the note of \$35,000.00 and the balance under the guaranty of I. Gevurtz & Sons that

the proof of claim of The R. R. Thompson Estate has been filed in this matter.

“We have gone into the history of this case with some particularity and are willing to substantiate all of the facts by proper proof if required, as a basis for the application of the general principles and rules of law which we now desire to cite in connection with this matter.

“Assuming this statement to be the actual facts we can therefore assert that:

“First: I. Gevurtz & Sons has received the fruits of the contract and retained the consideration for it; that it received the benefit of all of the payments made by The R. R. Thompson Estate Co. under this contract.

“Second: That I. Gevurtz & Sons received the greater portion of the proceeds of the transaction.

“Third: That the guaranty was not a naked one, but was coupled with an interest, and was really more for the benefit of I. Gevurtz & Sons than for Multnomah Hotel Company.

“Fourth: That I. Gevurtz & Sons retained the valuable consideration from R. R. Thompson Estate Co. for which it assumed liability under the guaranty.

“Fifth: That the contract has been fully performed by R. R. Thompson Estate Co. and cannot be restored to its former status or honestly dealt with otherwise than by a specific performance on the part of I. Gevurtz & Sons.

“We positively assert that even if the wording of the amendment to the articles of incorporation of I. Gevurtz & Sons was not broad enough to include obligations of

this character, or if by a strict and the very most narrow construction of the wording of said amendment it might be concluded that it did not have the effect we ascribe to it, we believe that the intention and purpose of the directors in adopting the amendment should control. But even aside from this, we contend that the broad powers given under the articles of incorporation 'generally to do any all things incidental, appropriate, proper or necessary to enable said company to carry on any of the enterprises or purposes above enumerated,' taken in connection with the practice and custom of this concern in incorporating subsidiary companies for the purpose of promoting its own business interests, and the general necessity and requirements of all purchasers of stock of subsidiary companies to require that the assets thereby acquired should be freed and cleared of all liens, obligations or liabilities, made the guaranteeing and indemnifying of purchasers against such obligations as much of an incident, proper and necessary to enable said company to carry on its enterprises or purposes as the implied warranty of the title of any merchandise it might sell.

"But if for the sake of argument it should become necessary to admit that the amendment was not broad enough to give the corporation power to execute the guaranty in question, we would contend in the first place that this would not affect the execution of the note, and that even without any such power in the articles of incorporation it had a right to become a guarantor in the ordinary course of its business and for the reason that it had received the proceeds and benefits of the transaction.

And furthermore, that having retained the fruits and benefit of the contract, and the contract having been fully complied with and performed on the part of The R. R. Thompson Estate Co., I. Gevurtz & Sons would be estopped from setting up the defense that it had no power to enter into the contract, or that it was prohibited by statute from so doing.

(Here follows a citation and discussion of authorities consisting of several pages.)

“We therefore beg to urge: First, that the amendment to the articles of incorporation is broad enough and the positive intent of same was for the very purpose of authorizing just such a transaction as this one; second, that even without this amendment, due to the custom of the corporation and the nature of its business, this act was one of the many which were considered incidental, appropriate, proper and necessary to enable the company to carry on the enterprises and purposes mentioned in the articles; third, that I. Gevurtz & Sons, and necessarily its successor, the trustee in bankruptcy, is estopped from denying the validity of the guaranty or avoiding it on account of ultra vires, for the reason that it received the benefit of the payments made by The R. R. Thompson Estate Co. and retained the fruits and consideration of it.

“In conclusion we would again call your attention to the fact that I. Gevurtz & Sons owned the stock and sold it. It received the consideration for it and was benefited to the extent at least of \$143,000.00, the amount it was obligated on the notes to the First National Bank,

and which the First National Bank could have collected from I. Gevurtz & Sons. In fact, it is a serious question in our minds whether the bank could have held the Multnomah Hotel Company on these notes, inasmuch as they were purely accommodation makers without any consideration whatever. The Multnomah Hotel Company, as you will remember, was incorporated in 1911 and all of the stock subscribed for by I. Gevurtz & Sons was fully paid up by the contract of I. Gevurtz & Sons fully to furnish and equip the hotel and deliver same free and clear of all liens or indebtedness. A year later, in May, 1912, I. Gevurtz & Sons, not having sufficient money to pay for the furniture and equipments which they placed in the hotel, were obliged to borrow it from the First National Bank, and the First National Bank, with over-abundance of caution, required I. Gevurtz & Sons to obtain the endorsement of the Multnomah Hotel Company to the notes and pledge all of the stock of the Multnomah Hotel Company as security. If the R. R. Thompson Estate Co. had not purchased the stock of the Multnomah Hotel Company when it did, both the Hotel Company and I. Gevurtz & Sons would have suspended at that time, and bankruptcy in both cases would have undoubtedly ensued. In such an event the liabilities of I. Gevurtz & Sons would have been \$143,000.00 greater than they are at the present, as the claim of the First National Bank on these notes would have been provable against I. Gevurtz & Sons, and even if they would have also been provable against Multnomah Hotel Company, which we doubt the assets of Multnomah Hotel Company in bankruptcy would have brought

very little, if anything, over and above the lien of the lessors of \$75,000.00 on the furniture as security for the rental. It will thus be seen that I. Gevurtz & Sons not only directly received the greater portion of the proceeds of the purchase price of this stock, but were greatly benefited by the transaction, and on all grounds of law, morals, right and justice they are estopped from setting up ultra vires as a defense to this action.

Respectfully submitted,

BAUER & GREENE and A. H. McCURTAIN.

Attorneys for The R. R. Thompson Estate Co."

COURT: I will allow it to go in.

Mr. Teiser: I now introduce in evidence the order allowing the claim of the R. R. Thompson Estate Company signed by Chester G. Murphy, referee in bankruptcy, on November 21, 1913.

Same objection. Objection overruled. Exception allowed.

Which said order was marked Exhibit "H" and is in words and figures as follows:

"IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT
OF OREGON.

"In the Matter of I. GEVURTZ & SONS, BANK-
RUPT.

ORDER ALLOWING CLAIM OF R. R.
THOMPSON ESTATE COMPANY.

“At a Court of Bankruptcy held at Portland on the 11th day of November, A. D. 1913, before CHESTER G. MURPHY, Referee.

“This matter coming on for hearing upon objections filed by the Trustee to the allowance of the claim of R. R. Thompson Estate Company, heretofore filed herein for allowance in the sum of \$60,489.42, and briefs in opposition to and in support of said claim having heretofore been filed by counsel and examined, and counsel heard, and the matter taken under advisement,

“IT IS ORDERED that the said claim be, and the same hereby is allowed as a general claim against this estate in the sum of \$57,566.04, a reduction of \$2933.38 being made upon stipulation of parties filed herein.

“Briefly the facts upon which this claim is based are as follows:

“The Multnomah Hotel Company was formed as a subsidiary company of the bankrupt corporation just prior to the opening of the Multnomah Hotel in the City of Portland, Oregon, and Gevurtz & Sons, who held a lease on the Multnomah Hotel property and had installed furniture therein in large amount, took all of the stock of said hotel company in payment for said furniture and leasehold interest, and thereafter the Multnomah Hotel Company presumably operated the hotel as a separate entity. However, there was an interlocking of directors with Gevurtz & Sons, and the account

was carried practically all of the time in the name of I. Gevurtz & Sons.

“However, when money was borrowed from the First National Bank of Portland in the sum of approximately \$175,000.00, the stock of the Multnomah Hotel Company was hypothecated as collateral security therefor and the Multnomah Hotel Company, by Phil Gevurtz, its president, likewise joined in the execution of the note.

“Later the bankrupt corporation and its subsidiary company, the Multnomah Hotel Company, finding themselves in financial difficulties, on or about January 16th, 1913, turned over all of the stock and assets of the Multnomah Hotel Company to the R. R. Thompson Estate Company, the owner of the hotel property, for the sum of \$175,000.00 in cash and gave the note of I. Gevurtz & Sons for \$35,000.00, due on or before July 1st, 1913, to cover additional outstanding accounts of the Multnomah Hotel Company, which the Thompson Estate Company agreed to pay under an agreement with I. Gevurtz & Sons, duly executed, whereby, in addition to said \$35,000.00 covered by note in question, they would also pay additional bona fide claims that might be outstanding against said hotel, the exact amount of which could not at that time be fixed.

“In pursuance of said agreement, the stock of the Hotel Company was turned over to the Thompson Estate Company, together with \$35,000.00 note, and thereafter bona fide claims against the Hotel Company were paid by the Thompson Estate Company aggregating, as shown in their claim (and which includes the \$35,000.00),

the total sum of \$60,489.42, and for the return of these advances the claim is made and filed herein.

“The ‘Trustees’ objection thereto are based on the following grounds:

“1st. That the obligation is an independent obligation of the Multnomah Hotel Company, a corporation no longer in existence, and

“2nd. That I. Gevurtz & Sons had no corporate authority under its charter to guarantee the payment of the obligation of the Multnomah Hotel Company, a separate entity, and had no authority, under its charter, to execute the contract in question guaranteeing the repayment to the Thompson Estate Company of bills against the Multnomah Hotel Company, agreed to be handled by said estate company.

“I am of the opinion, however, after careful consideration of the law and the facts in this case presented, and after an examination of the charter of I. Gevurtz & Sons, and the amendments thereto, and after an examination of the contract entered into by the bankrupt, that the objections of the ‘Trustees’ are not well taken and that the claim of the R. R. Thompson Estate is a provable one against the bankrupt estate, and it is so ordered.

(Sgd) C. G. MURPHY,

Referee in Bankruptcy.”

Mr. Teiser: Now I will introduce in evidence, your Honor, dividend sheets in the I. Gevurtz & Sons proceedings, showing the direction of payment to the R. R. Thompson Estate Company of some thirteen or fourteen thousand dollars dividends on this claim of \$57.-

567.04, which is the \$60,000 less the stipulated reduction of two thousand some hundred dollars.

COURT: What proportion of this \$60,000 was paid out of the estate?

Mr. Teiser: Of I. Gevurtz & Sons?

COURT: Yes.

Mr. Teiser: 23 per cent, so far. The estate is not closed.

Mr. McCurtain: I make the same objection as last stated.

Objection overruled. Exception allowed.

Which said dividend sheet marked Exhibit "I," omitting parts not pertaining to, or in any way connected with this controversy, is in words and figures as follows, to-wit:

	Allowed after hearing	
#380—R.R. Thompson Estate Co.	for	Dividend
Filed for \$60,489.42	\$57,556.04	\$2877.80

And which said dividend sheet marked Exhibit "J," omitting parts not pertaining to, or in any way connected with this controversy, is in words and figures as follows, to-wit:

	Allowed after hearing	
#380—R.R. Thompson Estate Co.	for	Dividend
Filed for \$60,489.42	\$57,556.04	\$10,360.08

Mr. McCurtain: I will say we will admit that dividends have been paid to the extent of 23 per cent, if it will shorten the record any.

COURT: Is the Gevurtz estate settled?

Mr. Teiser: No, sir.

COURT: Will there be other payments?

Mr. Teiser: There will be, I suppose. I don't know, your Honor, whether there will or not. There will probably be a small dividend. I don't suppose there will be a 2 per cent dividend, will there?

Mr. McCurtain: I don't know. We are not handling that. It probably won't be over one or two per cent.

Mr. Teiser: I don't know about that, your Honor. I would also like to introduce in evidence schedules in bankruptcy of the Multnomah Hotel Company. It is possible at this time this may not be admissible. I am introducing it for what it is worth.

Which said Exhibit "K," being the original Schedule in Bankruptcy filed by the Multnomah Hotel Company, and which was verified by Roy O. Yates, president of Multnomah Hotel Company, omitting those parts which relate to the scheduling of claims other than the plaintiffs' herein, is in words and figures as follows, to-wit:

"SCHEDULE A-3

Name of Creditor	Residence	When and Where Contracted	Nature and Consideration	Amount
Weinhard Brewery Co.	Portland, Or.	Portland, Or.	Goods, Wares and Merchandise.	\$3500 (Individual Liability)"

Mr. Teiser: Your Honor, we had a stipulation with counsel—I have here the Multnomah Hotel Company's books—that it would not be necessary to put the trustee in bankruptcy on the stand to identify these books, as the books of the Multnomah Hotel Company. That is correct, is it not?

Mr. Bauer: We will consent to that.

Mr. Teiser: And that the books were kept under the regime of Mr. Yates.

Mr. Bauer: I don't say that. Mr. Yates took possession for the Thompson Estate Company.

Mr. McCurtain: What do you want to show by these books?

Mr. Teiser: I want to show that on page 22 of the journal there is scheduled or listed "I. Gevurtz & Sons, bills payable, \$6550.00." And credited bills payable \$6550.00. And under that "We assume payment of the following notes: Henry Weinhard Estate \$1500, Henry Weinhard Estate \$4500, National Cash Register \$550."

Mr. McCurtain: You want to prove that the Multnomah Hotel Company's books show that entry?

Mr. Teiser: Yes.

Mr. McCurtain: We admit it.

Mr. Teiser: You admit they were kept by Mr. Yates?

Mr. McCurtain: Kept under his direction while he was managing the hotel. They were kept under his direction.

COURT: I understand you admit the whole entry?

Mr. McCurtain: Yes. The entry shows that the Multnomah Hotel Company assumed these notes and agreed to pay them.

Mr. Teiser: You admit the entry?

Mr. McCurtain: Yes, whatever you can get out of it.

Mr. Teiser: Not your deductions.

Mr. McCurtain: Whatever inference can be drawn from it, yes.

Mr. Teiser: Now, your Honor, for fear that I have failed to ask that all these claims and other matters which I have introduced in evidence be introduced in evidence, I now offer them in evidence; and I assume that you will admit that they are filed on the dates, so far as the claims are concerned, which are set forth by the stamp of the referee?

Mr. McCurtain: I want your Honor clearly to understand, with relation to these records, we do not want to raise any objection to the form of the offer or any question about the authenticity of the papers or the dates they were filed, or anything that is shown by those records. The only purpose I have in making objection is to save what we consider our rights under the complaint. We claim that the entire record so far introduced is incompetent, irrelevant and immaterial, and does not in any way tend to bind the Thompson Estate Company to the payment of this note.

COURT: I understand your objection. You may have your exception.

Mr. Teiser: Now, your Honor, it is always a little embarrassing to speak about attorney's fees, but there is

a claim under that note for attorney's fees. It is a claim of \$500 for attorney's fees for suit on the note, and if your Honor will decide that question, I am perfectly willing to leave it to your Honor in case the decision is in our favor.

Mr. McCurtain: We are perfectly agreeable to that suggestion, if you find for the plaintiffs, that you fix such attorney fee as you deem is reasonable under all the circumstances.

COURT: Very well.

Mr. Teiser: We rest, your Honor.

Mr. McCurtain: We rest, your Honor.

ARGUMENT.

Mr. McCurtain: We would like the admission in the record that you are not seeking to claim here on estoppel.

Mr. Teiser: I am not seeking to recover on estoppel in this case. I am saying you are estopped from claiming certain things you are claiming in this case.

Mr. McCurtain: I would like the record to show that.

After the hearing of said cause the court took the same under advisement, and on or about the 21st day of May, 1917, made and entered judgment for the plaintiffs, as will appear from the judgment order filed; and thereafter on or about the 8th day of June, 1917, the defendant duly filed its motion for a new trial and for an order vacating and setting aside the general findings and judgment theretofore made and entered, and for a rehearing and tendered to the court special findings of

fact and conclusions of law which it requested the court to make, and that on the hearing of said motion the following proceedings were had, to-wit:

“WOLVERTON, District Judge. (Orally)

“There are two cases bearing upon this subject, which I have examined, and one is the case cited by counsel this morning—*Humphreys v. Third National Bank of Cincinnati, Ohio*, found in 75 Federal at page 852. That is a case in the Circuit Court of Appeals for the Sixth Circuit. In that case Judge Taft intimates that the practice has resulted as a sort of trap to catch the unwary, although upon consultation of the decisions of the Supreme Court of the United States every lawyer ought to be advised of the practice.

“Of course, it is my purpose to avoid entrapping counsel or the parties into a situation that would prevent them from presenting their case in full in the Court of Appeals.

“Now, there are two ways of raising the questions which it is proposed to raise in this case. The question that is desired to be raised primarily is whether or not the testimony in the case supports the verdict. That is the effect of it. One way of raising that question is, as pointed out by Judge Taft in his opinion, by request to the court to direct a verdict on the ground of insufficiency of the evidence. That is a motion that is often made when a jury is called and the trial is before a jury, and it is a motion that could have been made in this case; and I do not think that the court at this time would be warranted in setting aside this verdict for the purpose of

allowing that motion to be made. The other manner in which the question might be raised is by presenting to the court findings, and then the court may pass upon those findings. If the court refuses to make the findings, then that may be reserved by exception, and that would raise the entire question.

"I rather think in this case, in order that the matter may be fully presented, that the verdict should be set aside, and the court will refuse these findings which have been tendered, and then the court will make the same general findings as it made before, and the judgment may be entered as of this date. The clerk will make a copy of those findings, so that I can sign them, the general findings, and that will make up the record of the court.

"Mr. Greene: If your Honor please, the exceptions will be separate as to each proposed finding that we submitted, I suppose?

"COURT: Yes, and to each proposed finding of law, and the general exception to the refusal to find as you have requested.

"Mr. Greene: May we also at this time, your Honor, request the court to make special findings in accordance with the general verdict, the finding that you made, and except to the court's refusal to make special findings covering your verdict or general finding and judgment or conclusion therefrom?

COURT: Well, you will have to formulate those special findings before they will amount to anything.

"Mr. Greene: That is what I was a little doubtful about, because those findings would be adverse to our

contention; and it seems to me that, if the court saw fit to make special findings in support of your general finding and conclusion or judgment, the counsel for the side in whose favor your general verdict is, if the court orders them or wants to make those special findings, ought to prepare special findings to support the verdict.

“COURT: My view of the law on that question is this: That under the statute the court has a discretion to make either special findings or a general finding. In this case the court has exercised its discretion in making a general finding. It is like the trial of a case before a jury—sometimes counsel ask that the jury make special findings. The court then and there exercises its discretion as to whether it will submit to the jury special findings. Generally this court has refused to submit to the jury special findings.”

“Mr. Greene: I know as a rule they do make more trouble than the convenience accruing from them.

“COURT: Many times they do.

“Mr. Greene: In this suggestion of mine I was following the suggestion I think Judge Taft made in that case your Honor cited: that if counsel desire to review errors of law, they must ask the court for special findings, and, as I recollect that decision, Judge Taft indicates that the special findings you tender the court must be the special findings warranted by his general finding, therefore adverse to you, and then take exception to his refusal to make those special findings; or if he does make them, then you have the special findings against you.

“COURT: I will decline to exercise—in the exercise of my discretion, I will decline to make any special findings which support the general verdict in this case.

“Mr. Greene: And allow us an exception to that, your Honor.

“COURT: Yes, you may have your exception to that. The other case I referred to, that I meant to have called to your attention, is the case of *Kentucky Life & Acc. Ins. Co. v. Hamilton*, 63 Fed. 93. That was also a case of the Circuit Court of Appeals, Sixth Circuit, and is a review of the Supreme Court decisions upon the subject.

“Mr. McCurtain: That is Judge Lurton’s decision, is it not, your Honor?

“COURT: Yes, that is Judge Lurton’s decision. This is as far as I think I ought to go in this case.

“Mr. Greene: I think that is sufficient, your Honor. We will draw the order and submit it to counsel, in accordance with your Honor’s ruling today.

“COURT: Very well. There is a case that has gone up, that is now pending in the Circuit Court of Appeals, *Pacific Machinery Company v. Meyer*. It involves machinery in a saw mill plant.—Senator Gearin was on one side and Seattle attorneys on the other. In that case I made a general finding, and after that I permitted the losing party to submit special findings, and those I declined to approve or sign. At the same time the other party submitted special findings also, and I refused to sign those.

“Mr. Greene: Well, they may go up on pretty much the same sort of record that we have here.

“COURT: That you would have had here if I had not set aside this verdict.

“Mr. Greene: Yes. I see.”

Thereafter the court entered its order on or about the 8th day of June, 1917, allowing defendant's motion for an order setting aside the general verdict or findings and judgment theretofore entered on the 21st day of May, 1917, and considered the special findings of fact and conclusions of law proposed and requested by the defendant, which proposed findings of fact and conclusions of law were filed with the clerk of this court, and the court by said order refused to make, sign or file the said findings of fact or conclusions of law proposed by the said defendant, or either of them, to which refusal of the court as to each of said proposed findings of fact and conclusions of law separately the defendant duly excepted, and the court allowed the defendant's exception to its refusal to make sign or file said findings of fact or conclusions of law, and to each of them separately.

Whereupon the defendant requested the court to make, sign and file special findings of fact and conclusions of law herein in accordance with the general findings and verdict theretofore entered and vacated by the court, and the court in its discretion refused to make any special findings of fact or conclusions of law in said cause, to which refusal of the court to so make and sign special findings of fact and conclusions of law, the defendant duly excepted and the court allowed its exception.

THE FOREGOING BILL OF EXCEPTIONS was presented to the court the 2nd day of Au-

gust, 1917, within the time allowed by order of the court to present the same and counsel for plaintiffs and defendant, respectively, in open court having stipulated and agreed that the foregoing proceedings shall stand as the statement of facts on appeal, and that it contains all of the evidence and proceedings had in this court in the trial of said cause, and that those portions omitted from the exhibits set forth herein are entirely foreign to this controversy and have no materiality in connection therewith.

IT IS ORDERED that the foregoing Bill of Exceptions and transcript of the evidence and proceedings, be and it is hereby allowed this 2nd day of August, 1917, and that the same shall stand as the statement of the facts in this cause on appeal.

Dated at Portland, Oregon, this 2nd day of August, 1917.

(Signed) CHAS. E. WOLVERTON,

District Judge.

(Endorsed) Filed Aug. 2, 1917.

G. H. MARSH, Clerk.

That thereafter, on the 15th day of August, 1917, there was duly filed in said court and cause a Stipulation as to Transcript of Record which (omitting title and formal parts) is in words and figures as follows, to-wit:

STIPULATION AS TO TRANSCRIPT OF RECORD.

(Endorsed) Filed Aug. 15, 1917.

G. H. MARSH, Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.

Louise Weinhard and Anna Wessinger, Paul
Wessinger and Henry Wagner, Execu-
trices and Executors, respectively, of the
last Will and Testament of Henry Wein-
hard, deceased,

Plaintiffs,

vs.

The R. R. Thompson Estate Company, a
corporation,

Defendant.

IT IS HEREBY STIPULATED by and between
the attorneys for the plaintiffs and the attorneys for the
defendant, respectively, that the Transcript of Record
on Writ of Error in the above styled cause shall consist
of the following documents:

Complaint, Amended Answer, Reply, Stipulation
Waiving Trial by Jury, Opinion on the Merits, Find-
ings of Fact (filed May 21, 1917), Judgment Order (of
May 21, 1917), Motion to Vacate and Set Aside General
Findings and Judgment and for a New Trial, Findings
and Conclusions Proposed by Defendant, Opinion and
Order (of June 11, 1917), Findings of June 11, 1917,
Petition for Writ of Error, Assignments of Error, Or-
der Allowing Writ of Error, Writ of Error, Bond, Or-
der of Supersedeas, Citation on Writ of Error, with
acceptance of service, Order for time to file Transcript
of Evidence, Bill of Exceptions, and this Stipulation.

Dated at Portland, Oregon, this 14th day of August,
1917.

SIDNEY TEISER,

Of Attorneys for Plaintiffs.

A. H. McCURTAIN,

Of Attorneys for Defendant.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,

District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, hereby certify that the foregoing pages numbered 1 to ———, inclusive, contain and are a true transcript of the record and proceedings had in said court and cause entitled The R. R. Thompson Estate Company, a corporation, vs. Louise Weinhard and Anna Wessinger, Paul Wessinger and Henry Wagner, Executrices and Executors, respectively, of the Last Will and Testament of Henry Weinhard, Deceased, and contains in itself and not by reference, all the pleadings, orders, papers, files and journal entries therein made or considered by the court in the rendition of the final judgment; the Petition for Writ of Error, order thereon, Assignments of Error, bond, together with all the evidence and exhibits and introduced on the trial as the same appear in my office and official custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court this ——— day of August, 1917.

.....
Clerk.